A

TREATISE

UPON THE

Law of Mortgages.

By JOHN JOSEPH POWELL,
Of the MIDDLE TEMPLE, Esq;
BARRISTER AT LAW.

Haud ignara mali, miseris succurrere disco.
ÆNEI. LIB. I.

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A

TREATISE

UPON THE

Nature of Phosphorus.

MVSEVM
BRITAN
NICVM

TO

CHARLES FEARNE, Esq.

AS the period was drawing near, when the following treatise was to be submitted to the public eye, my feelings suggested to me, how much I stood in need of the kind introduction of a respectable name, known to that public, before whose tribunal I was going to appear. Among the exalted characters which now adorn the profession of the law, the distinguished eminence which you have so justly acquired, as well as your high reputation for general science, excited in me an earnest desire, that I might be permitted to use the sanction of your name on this occasion. I felt that under such auspices, I should enter with more confidence into

the dangerous, and to me, untrodden path of an author. It is therefore, Sir, with the moſt lively gratitude, that I expreſs the ſenſible impreſſion your kind condeſcenſion, in acquieſcing in this requeſt, has made on my mind; and intreat you to accept my acknowledgments for your indulgence in this reſpect, which has added, to the favors already conferred on me, an obligation, that I ſhall always reflect upon with pride and pleaſure.

I am,

Sir,

Your moſt reſpectful,

moſt obliged,

and obedient ſervant,

JOHN JOSEPH POWELL.

TO THE READER.

OF all the branches of learning which the ſcience of the law embraces, none appears to be more intereſting, than that meant to be conſidered in the following treatiſe; there being few men poſſeſſed of either real or perſonal eſtate, who are not more, or leſs concerned in that ſpecies of property called a mortgage. And although eventual circumſtances, ariſing from the political ſituation of the country, have rendered contracts of this kind leſs common in the metropolis, than they were formerly, yet, as, in the remote parts, this ſpecies of ſecurity ſtill obtains, and is preferred to that of veſting money in the public funds, a ſyſtematical treatiſe upon this head muſt be particularly uſeful to the gentlemen of the profeſſion there; who, being in a line of buſineſs falling more immediately under this de-

ſcription, muſt have ſeverely felt the want of ſuch a Treatiſe, none on this ſubject having appeared ſince the year 1728.

Theſe conſiderations induced the author to attempt, a methodical arrangement of the authorities extant upon this branch of conveyancing.

Towards the accompliſhment of his object, he truſts more to a ſpirit of labour and induſtry, with which he conſtantly finds himſelf inſpired, when engaged in the purſuit of legal information, than to any ſuperior knowledge, he preſumes to arrogate to himſelf; hoping ſo to digeſt the authorities and opinions upon this head, as that they may tend to illuſtrate each other, rather than expecting to reflect any great light upon the ſubject himſelf.

In the purſuit of his plan, the author found his work had already imperceptibly increaſed, and that it would neceſſarily extend itſelf, far beyond the limits he had originally preſcribed to himſelf, according to the ideas he entertained

tertained upon the ſubject. This conſideration induced him to think of altering his deſign, by adopting a more confined method of treating it: but recollecting the frequent embarraſſments he had himſelf been put to in his ſtudies, from books written, as if intended more for the peruſal, of the adepts in ſcience, than for the information and inſtruction of the unlearned and inexperienced, he thought it beſt, and moſt conformable to his original deſign, which was to ſmooth the way for others, by removing the difficulties he had experienced, to ſacrifice conciſeneſs to perſpicuity and accuracy, preferring the imputation of being prolix and tedious to that of being obſcure and perplexing.

No. 29, *Caſtle-Yard, Holborn,*
April 1785.

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21.	——	3. *after* forfeited *place a comma.*
22.	——	2, 3. *for* at end *read* at the end.
32.	——	*laſt line, for* that the *read* and that the.
66.	——	13. *for* him, *read* the leſſee.
68.	——	6. *for* as treſpaſſor *read* as a treſpaſſor.
69.	——	2. *for* to the diſſeiſor *read* againſt the diſſeiſor.
80.	——	*laſt line, for* a *read* as.
119.	reference 14. *b.*	16. *for* Co. Litt. 146, *b. read* Co. Litt.
131.	——	27. *for* all other incumbrances *read* all real incumbrances.
138.	——	25. *for* mortgagor *read* mortgagee.
183.	——	1. *for* thus *read* there.
191.	——	28. *for* teſtator *read* teſtators.
224.	——	14. *for* for the reaſon *read* one reaſon.
232.	——	7. *for* bye *read* by.
249.	——	4. *for* age *read* agent.
273.	——	6. *for* the perſonal eſtate *read* the eſtate.
291.	——	29. *for* if admiſſable *read* if relevant.
400.	——	13. *for* ſiject *read* ſubject.

CAP. I.

Of the Origin and ſeveral Kinds of Mortgages.

THE notions of mortgaging and redemption are, by ſome, thought to have originated with the Jews, one great object of whoſe law, was, the conſtitution of a juſt and equal *agrarian*, with a view to keep their lands in the ſame tribes and families. For this purpoſe, they appointed a certain period, at which, whatever alienations might have taken place in the mean time, all landed property ſhould revert to its original owner. The time of this general reſtoration of property was called the jubilee, and returned once in fifty years; therefore, if any were compelled, by neceſſity, to part with their land in the mean time, they could transfer no intereſt therein, or incumber them further, than, to the next general jubilee: with a view to that, therefore, they made their computations, and, according to the diſtance from thence, was the extent of intereſt, in land, that could be transferred to a buyer; but the vendor, by their law, had power at any time to redeem, repaying the value of the

Cunæus 11-12-13-14. Ancient Univerſ. Hiſtory vol. 2, 130—131. Bacon's Abr. Tit. Mortgage.

lands, from the time of redemption to the jubilee, and, if they were not redeemed before the year of jubilee, then the lands, of courſe, reverted, releaſed from the debt, to the vendor and his heirs.

Juſtin 592.

But mortgaging, as practiſed with us, ſeems to owe its introduction more immediately to the civil law, which diſtinguiſhed between pledges, and things hypothecated.

The *pignus* was, when any property was pledged for money lent, and *actual* poſſeſſion paſſed to the creditor.

The *hypotheca*, was, when any thing was pledged for money lent, and the poſſeſſion *remained* with the debtor.

Digeſt Lib. 20 Tit. 6. Corvin Dig. 269, 270, 271.

If the money borrowed, either on the *pignus* or *hypotheca*, was not repaid, and the property redeemed, the creditor had his *actio pignoritia* or *hypothecaria*, which, when he had purſued to ſentence, gave him an authority to ſell the property, as his own; but, there was this difference between theſe actions; namely, that the former was only *againſt* the *perſon* of the debtor, to foreclоſe him; becauſe the *pignus* was already in the poſſeſſion of the creditor: but the latter was, *tam in rem quam in perſonam*, and

and was given *ad pignus proſequendum, contra quemcunque poſſeſſorem*; becauſe, in this caſe, the creditor had not the poſſeſſion of the pledge, but it remained with the debtor.

It being a fixed rule in the feudal law, that, *feudalia, invito domino, aut agnatis, non recte ſubjiciuntur hypothecæ, quamvis fructus poſſe eſſe, receptum eſt*; therefore, the feudatory could not obtrude a tenant on the lord without his leave, ſuch tenant being the perſon on whom the lord depended for his perſonal ſervice in war and peace: and, as the tenant could not aliene without licence, ſo, neither could he mortgage without licence. Corvin Dig. 268.

But, when a licence was given for alienation about the time of Hen. III. and it became a maxim in law, *that the purity of a fee-ſimple, imported a power of diſpoſing of it as the owner pleaſed*, there were two ways of mortgaging lands introduced, which *Littleton* diſtinguiſhes, by the names of *vadium vivum*, and *vadium mortuum*. 9 H. 3. 32. 18 Ed. 1.

The *vadium vivum* was, where a man borrowed 100 *l.* of another, and made an eſtate of lands to him, until he had received that ſum out of the iſſues and profits thereof; and was ſo called, becauſe, neither the money, or the lands, were loſt; for the latter were *conſtantly* paying off the

former, and were not left as a dead pledge, in caſe the money was not paid.

Litt. Sec. 332. Co. Litt. 205. Terms de la ley 448. 2 Black. Comm. 157, 158.

The *vadium vivum* (to which our attention hereafter will be particularly applied) was, where one man borrowed of another a ſpecific ſum of money, and granted him an eſtate, as a ſecurity for the repayment, on condition, that if the mortgagor repaid the mortgagee the ſum lent, on a certain day mentioned in the deed, then, that the mortgagor might re-enter thereupon: and was ſo called, by *Littleton*, becauſe it was doubtful, whether the feoffor would pay the money at the day limited, or not; and if he did not pay it, then, the land, which was but in pledge upon condition, for the payment of the money, was not to be reſtored to the owner, and therefore, was conſidered as dead to *him*; and if he did pay it, then, the pledge was to be reſtored to him, and, conſequently, the tenant of the land in pledge had no further intereſt therein.

Cragii Juſ. Feud. 234, 235.

Madox 318, 319.

Of the laſt ſpecies of mortgages there are two kinds.—Firſt, mortgages of the freehold and inheritance; and, Secondly, of terms for years.

Ibid.

The ancient way of making mortgages of the freehold and inheritance, was, by a charter of feoffment, on condition, that if the feoffor, or his heirs, paid the ſum borrowed

to the feoffee, or his heirs, at a day appointed, he ſhould re-enter and re-poſſeſs.

Sometimes the condition was contained in the charter of feoffment, and ſometimes it was defeazanced by a diſtinct inſtrument; for, as a man might annex a condition to his feoffment, the maxim being that, *cujus eſt dare, ejus eſt diſponere*, ſo he might annex a condition, thereto, by another deed, bearing date, and executed, at the ſame time; for, being executed at the ſame time, it is *really* but one and the ſame diſpoſition; but, if the defeazance, or condition, was contained in a deed executed after the feoffment, it came too late; becauſe, livery of ſeiſin, or corporal tradition, being neceſſary, at common law, to all conveyances of land, no mortgage thereof was valid unleſs poſſeſſion alſo was delivered to the mortgagee, and the livery, *coram paribus* in ſuch caſe, atteſting an infeudation, in which there was no condition, the tenant muſt hold the land according to *that* inveſtiture.

Glanvil L. 10. c. 8. 2 Black. Com. 160.

Again, a diſtinction was taken, at common law, where a man granted an eſtate to another, by way of mortgage, for ſecuring a ſum of money at a day appointed, in the nature of a gratuity or gift; and, where a man was indebted to another in a certain ſum, previous to the grant, and made a mortgage of his eſtate, in fee, or otherwiſe,

Co. Lit. 207. *a.* 209. *a. b.* Litt. Sec. 335. 338. 9 Co. 77.

wiſe, to ſecure the ſame to the mortgagee: for, in the former caſe, a tender of the money, within the time, and by the perſon named in the condition, diſcharged the eſtate mortgaged from the condition, and gave to the mortgagor a right of entry: becauſe, there being no debt, independent of the condition, the money was conſidered, in law, as collateral to the land, that is, not parcel of it; and the mortgagor, having performed the condition as far as was in his power, and being prevented from compleating it by the refuſal of the mortgagee, was intitled to have his lands again; and, then, the mortgagee, having no further lien thereon, or any *perſonal action*, was left without any remedy for his money: but, in the latter caſe, although, by tender of the money to the mortgagee, and his refuſal, the mortgagor became intitled to enter into the land, freed for ever from the condition; yet, the debt ſtill remained, and might be recovered, by action of debt; for it was a *duty* diſtinct from the condition, and, therefore, not loſt by the tender and refuſal.

Co. Litt. 219, *b*.

In the performance of conditions, a diſtinction is made, between thoſe which are to create an eſtate, and thoſe which are to deſtroy it; for the former may be performed, by conſtruction of law, as near the condition as may be, and according to the intent and meaning thereof, though the letter and words

words cannot be complied with; but the latter are to be ſtrictly conſtrued, unleſs in ſpecial caſes.

Conditions, annexed to eſtates, granted by way of mortgage, were conſidered to be of the former deſcription; for, although, by the performance of the condition, the eſtate was to be diveſted out of the mortgagee; yet, it was with intent to re-inſtate the mortgagor in his inheritance.

Co. Litt. 205. *a.* 206. *a.* 213. *a.* 221. *b.* 1 Co. 22. Sir T. Wyatt's caſe, Cro. Car. 427.

However theſe ſorts of conveyances, by way of mortgage in fee, were attended with great inconveniences; as, if the money was not paid at the day, ſo that the condition was forfeited and the eſtate became abſolute, the eſtate was, thenceforth, ſubject, at common law, to the dower of the wife of the feoffee, and to all his other real charges and incumbrances; for, though, if the feoffor performed the condition, then he might re-enter, and repoſſeſs himſelf in his former eſtate, and, conſequently, was in, above all charges, and incumbrances of the feoffee; yet, if he did not *literally* perform the condition, by payment of the money at the day, then, the eſtate was *legally* ſubject to the charges and incumbrances of the feoffee, though the money ſhould be afterwards paid, and the eſtate re-conveyed to the feoffor.

Co. Litt. 221. 222. Hurd. 463. Cro. Car. 191. 1 Eq. Ca. Abr. 311. 5. Bac. Abr. 632.

To

2 Black. Com. 158.

To avoid theſe inconveniences, the ſecond ſort of mortgages were adopted, and it became uſual to grant only a long term of years, by way of mortgage, with condition to be void, upon non-payment of the mortgage-money: which courſe has been ſince continued, principally, becauſe, on the death of the mortgagee, ſuch term becomes veſted in his perſonal repreſentatives, who, now are, (as will be ſhewn) intitled, in equity, to receive the money lent, of whatever nature the mortgage may happen to be.

Bac. Abr. 633.

Mortgages by way of creating terms, were formerly by way of demiſe and re-demiſe. Thus, if *A.* borrowed money of *B*, he, thereupon, demiſed land to *B.* for a term of 500 years abſolutely, with common covenants againſt incumbrances, and for further aſſurance; and then *B.* the day after, re-demiſed to *A.* for 499 years, with condition, to be void on non-payment of the money at the day apppointed. But the common method of mortgaging now, is, by a demiſe of the land for a term, under a condition to be void on the payment of the mortgage-money and intereſt, with a covenant, inſerted, at the end of the deed, that, until default ſhall be made in the payment of the money, the mortgagor ſhall receive the rents, iſſues, and profits, without account.

And the laſt and beſt improvement of mortgages ſeems to be, that in the mortgage deed of a term for years, or the aſſignment thereof, the mortgagor ſhall covenant for himſelf and his heirs, that, if default be made in the payment of the money at the day, then he and his heirs will, at the coſts of the mortgagee and his heirs, convey the freehold and inheritance of the mortgaged lands to the mortgagee and his heirs, or to ſuch perſon or perſons (to prevent merger of the term) as he or they ſhall direct or appoint. For the reverſion, after a term of fifty or one hundred years, being little worth, and yet the mortgagee, for want thereof, continuing but a termor, ſubject to forfeiture, &c. and not capable of the privileges of a freeholder, it is but reaſonable that when the mortgagor cannot redeem the land, the mortgagee ſhould have the whole intereſt and inheritance of it, to diſpoſe of as abſolute owner. Bac. Abr. 633.

Since the low ſtate of the funds hath made money on mortgage leſs eaſily procured than in more proſperous times, it hath not been unuſual for the party lending the money, to ſtipulate that it ſhall lie on the land for a given period of time, which agreement is made part of the deed, and hath been conſidered by the beſt authorities as binding upon the parties.

CAP.

CAP. II.

How a Mortgage is conſidered in Equity.

AT common law, while the ſtrict rules of the feudal ſyſtem were permitted to remain checks upon the free alienation of real property, no idea was entertained of making it ſubſervient to the ordinary exigencies of the owner thereof, by ſuffering it to become the ſubject of a pledge. The land-holder, therefore, how preſſing ſoever his neceſſities might be, had no means of raiſing money on his eſtate but by a conditional ſale thereof; and if by any unforeſeen event, he became incapable of performing the condition ſtrictly, or at leaſt in effect, at the time appointed, his property in the land was gone from him, and abſolutely veſted in the purchaſer, without any poſſibility at law of recovering it. The conſequence of which was, that an eſtate of great value might be forfeited for a trifling conſideration. But when the ſtern and rigid ſeverities of that tenure yielded to the importunities of a more refined age, and the benefits of commerce were found to keep pace with the extenſion of a free aliena-

tion,

tion, the Courts of Equity moulded contracts reſpecting real property into the ſhape moſt convenient for the purpoſes of ſociety. In adjuſting the various rules reſpecting it, many conteſts aroſe between the Courts of law and equity. The former ever diſplaying a ſtrong inclination, to adhere to the old rigid maxims introduced for the purpoſe of preſerving real property unalienable; whilſt the latter, were diſpoſed to conſider the eſſential nature of contracts, and to give them operation according to the intention of the parties thereto. In the end they prevailed, and an equitable juriſdiction was gradually introduced, which, by correcting without enfeebling the ſevere rules of the common law, laid the foundation of a ſyſtem of juriſprudence, admirably adapted to the attainment of ſubſtantial juſtice.

The law reſpecting mortgages became almoſt a ſubject of excluſive juriſdiction in thoſe Courts; for, although in law, the mortgagee, (the mortgage being effected by a conditional alienation of the land and an actual livery,) was conſidered as the proprietor thereof, ſubject to be diveſted of it only by the ſtrict performance of the condition, yet, in equity, the tranſaction was deemed a mere perſonal contract for the loan

Prec. Ch. 99.
Barnard. 93.
1 Vez. 361.

loan of money, and the land a ſecurity for the due performance thereof, and the mortgagor was looked upon, notwithſtanding the ſolemnities attending the conveyance, as the actual owner of the land. The debt conſequently was there eſteemed the principal, and the land the incident; and whenever the debt was diſcharged, the intereſt of the mortgagee in the land determined of courſe, and he became in equity, as to any eſtate therein remaining in him, a truſtee only for the mortgagor. But until redemption or ſatisfaction, the mortgagee's intereſt was good in equity to intitle him to receive and enjoy the profits.

1 Vern. 575.

Roper v. Ratcliffe. 9 Mod. 196.

From viewing the ſubject in this light, this concluſion neceſſarily followed, that a mortgage was not ſuch an alienation of a man's real property, as altered any diſpoſition of it made previous thereto, but only in ſo much as it was neceſſarily affected thereby; *ex. gra.* having been pledged by the owner, it could not be recovered by him or his alienee's, but by diſcharging the demand for which it was ſecurity, that being a lien thereupon. Thus where *T.* ſeized in fee, ſettled his lands by a voluntary conveyance to the uſe of himſelf for life, with remainder to his daughter and heir apparent in tail, remainder to his three brothers in tail, remainder to himſelf in fee, with pow-

Thorne v. Thorne. 1 Vern. 182.

er

er of revocation, and ſeven years after mortgaged thoſe lands in fee to one of the three brothers, that were remainder-men; and the condition of redemption was, that if the mortgagor or his heirs paid the money at the day he ſhould have the lands in his former eſtate. The mortgage became forfeited, and the mortgagee afterwards purchaſed of his elder brother, who was the heir at law. The third brother then brought his bill for the third part, by virtue of the remainder in tail limited to him and his two brothers, and the queſtion was, whether the mortgage was a total revocation, or only *pro tanto?* and held it was a revocation *pro tanto* only, the mortgagor being to have the lands, on payment, as in his former eſtate.

So where *I. S.* in 1663, by his will in writing, deviſed lands to *A.* in tail male, remainder to the plaintiff in fee, and having afterwards occaſion for money, mortgaged thoſe lands in fee, and in 1683 died. *A.* being dead without iſſue, the plaintiff, who had the remainder, brought his bill to be let into the benefit of this deviſe. It was objected by the counſel for the defendant, who was the heir at law, that this being a mortgage in fee was an abſolute revocation of the deviſe; although, if it had been but a mortgage for years, then, they admitted the reverſion would have paſſed, and that

Hall v. Dunch. 1 Vern. 329. 2 Will. 649. Earl of Lincoln v. Rolle. Show. Parl. Ca. 156. Montague v. Jefferys. 1 Roll. Abr. 616. Letter u, no. 2.

that would have carried with it the equity of redemption, and ſo the revocation would have been *pro tanto* only. But here being an eſtate in fee mortgaged, *that* went to the whole, and was a full and abſolute revocation in law; and being ſo in law, there was no reaſon for equity to aid the plaintiff againſt the heir at law. But the Maſter of the Rolls was of opinion, that a mortgage was a revocation *pro tanto* only, which decree was afterwards affirmed upon appeal to the Chancellor, his lordſhip, declaring, that tho' the mortgage in fee was a revocation at law, yet, in equity, it ſhould not be taken for a total revocation, but the deviſee ſhould be admitted to the redemption. For the intent of the mortgagor, in making the mortgage, could be no other than only to ſerve his ſpecial purpoſe of borrowing money to ſupply his preſent occaſion.

1 Vern. 342.

Every contract for the *loan* of money, ſecured by the conveyance of a real eſtate to the lender, and not made in contemplation of an eventual arrangement of property, is in equity, deemed a mortgage; and all private agreements between the parties, to alter in any ſubſequent event its *original* nature, or prevent the redemption of the eſtate pledged upon payment of the money borrowed with intereſt,

Mellor *v.* Lees 2 Atk. 495 Infra.

are void. For, were any ſuch agreements ſuffered to prevail, they would put it in the power of every mortgagee to take advantage of the neceſſities of the mortgagor, by inſerting reſtrictive clauſes to prevent a redemption of the eſtate pledged, unleſs upon terms injurious to the latter. In equity therefore, the right of redemption is conſidered as inſeparably incident to a mortgage, and can no more be reſtrained, than the power of tenant in fee ſimple to alien generally, or of tenant in tail to ſuffer a recovery; it being a maxim, that an eſtate cannot be a mortgage at one time, and at another time ceaſe to be ſo.

Thus, where Sir *Robert Jaſon*, father of the defendant, being ſeized of an eſtate chargeable with a mortgage for 4500 *l.* and intereſt, to one *Fiſher*, entered into a treaty of marriage with the plaintiff, and, by articles, it was agreed that 2100 *l.* ſhould be paid towards that debt, with 1500 *l.* the portion of the plaintiff, and 600 *l.* advanced by Sir *Robert*, which reduced it to 1900 *l.* for ſecuring payment whereof, by inſtalments at certain times, a leaſe of the premiſſes for five hundred years was made to *Travers* and *Finch* defendants, with a proviſo, that afterwards they ſhould join with Sir *Robert* to convey the premiſſes to truſtees and their heirs, to the uſe of Sir *Robert* for life,

Jaſon v. Eyres 2 Ch. Ca. 33. Trin. 32. Car. 2.

life, remainder to the plaintiff for her jointure and in full of dower, remainder to the truſtees and their heirs, in truſt, that if Sir *Robert* ſhould pay the 1900 *l.* with intereſt, amounting to 2700 *l.* within the ſaid times, if he ſhould ſo long live, or otherwiſe *within three years* after the date of the laſt mentioned conveyance, and procure the leaſe to be ſurrendered, to the intent, that if the defendant dame *Anne* ſurvived him, ſhe, ſo long as ſhe lived might hold the premiſſes diſcharged of the ſame, then the ſaid truſtees ſhould be ſeized of the premiſſes to the uſe of Sir *Robert* and his heirs; but in caſe either of failure of payment, or Sir *Robert*'s death before payment and ſurrender of the leaſe, then, that the truſtees, and the heirs of the ſurvivor of them, ſhould ſtand ſeized of the reverſion, to them limited, in truſt for the plaintiff and her heirs, *not only to enable her to pay the debt, and free her jointure thereof, but, to the end ſhe might enjoy the inheritance for increaſe of her fortune*, according to an agreement between her and Sir *Robert*; and ſhould convey the ſame as ſhe, during coverture or ſole, or her heirs ſhould direct. Sir *Robert Jaſon* died leaving the defendant his heir. Dame *Anne* married *Eyres* one of the plaintiffs, who, there being a former incumbrance not taken notice of, paid it with damages.

On

On this caſe, croſs bills were filed by *Eyres* and his wife to have the inheritance, and by the heir of Sir *Robert* to have the inheritance, on paying the debt.

On the hearing it was argued for *Eyres*, that it was an expreſs agreement that the wife ſhould have the inheritance, if the debt were not paid, or the leaſe ſurrendered; that it could not be a mortgage as to the wife, though the leaſe was a mortgage to *Fiſher*; that if it had been meant to have been *a mortgage*, the power of redemption would have been limited to the heir as well as to Sir *Robert*, *but it was only limited to him, and not to his heir*; that there was reaſon for ſo doing, becauſe her whole portion had been expended in reducing the debt, and ſo, until payment thereof, ſhe would otherwiſe have been without any profits of her jointure; that, in contemplation of this, it was expreſsly agreed, the reverſion ſettled in the truſtees ſhould go to the complainant and her heirs, not only to enable her to pay the debt, and free her jointure, but, to the end that ſhe might enjoy the inheritance for the increaſe thereof. But the court decreed it a mortgage, ſaying that, if the father Sir *Robert* had lived after three years, it could not have been denied but he might have redeemed it; and that, no mortgage could be

altered by any artificial words, unleſs by ſubſequent agreement.

Howard *v.* Harris 1 Vern. 33. 190. Sc. 2 Ca. Ch. 147. Sc. 2 Vent. 364.

So where *A*, having ſettled a jointure on the plaintiff before marriage that proved defective and not of value according to the marriage agreement, afterwards made her an additional jointure of other lands, and then, in 1673, made a mortgage to the defendant *B.* for ſecuring 1000 *l.* with intereſt, in which, among others, part of the jointured lands were comprized: in the mortgage deed there was a ſpecial clauſe of redemption that, *if* A. *or the heirs males of his body* ſhould, in *June* 1686, pay the principal ſum and intereſt in the mean time, then, he *or the heirs male of his body* ſhould be admitted to redeem, and there was likewiſe a covenant to pay the 1000 *l.* on the day of 1686, and intereſt in the mean time by half-yearly payments. *A.* died without iſſue, and his wife, being a jointreſs of part of the mortgaged premiſes, and ſo intitled to redeem the whole, exhibited her bill in 1677 for that purpoſe. The cauſe was heard before Lord Chancellor *Nottingham*, and afterwards re-heard before Lord Keeper *North*; and both decreed, that the mortgage ſhould be redeemed *notwithſtanding the mortgagor's death without iſſue*; the rather, becauſe the defendant had a covenant for re-payment of his mortgage money.

So,

So, where the condition of a mortgage was, to redeem *during the life of the mortgagor*, it was decreed, that the heir might redeem notwithſtanding.

Kilvington *v.* Gardiner. 1 Vern. 192. Cited in the laſt caſe.

It makes no difference whether the proviſo for redemption be in the ſame deed; or, whether the conveyance be abſolute, and the power of redemption given by a diſtinct inſtrument.

Thus where *A.* having a church leaſe for three lives, conveyed and aſſigned it to the defendant *B*'s father, in conſideration of 550 *l.* and, the conveyance was abſolute; yet *B.* the *purchaſer*, by deed under his hand and ſeal, agreed *that*, *if* A, *at the end of one year* then next enſuing, paid him 600 *l*, he would re-convey. The 600 *l.* was not paid, two of the lives died, the leaſe was twice renewed by the defendant and his father, and twenty years had paſſed ſince the firſt conveyance, when *A*, being a priſoner in the Fleet and indebted to the Warden for chamber rent, aſſigned to him all his right, title, intereſt, equity, and power of redemption in the premiſes; whereupon he brought his bill to redeem, and it was ſo decreed on payment of the principal and alſo the fines paid upon the renewal of the leaſes, with intereſt.

Manlove *v.* Ball. & Bruton. 2 Vern. 84.

Nor will an agreement to make the conveyance abſolute upon payment of a further ſum, if the money lent be not paid at the day appointed, alter the caſe; ſuch ſtipulations being deemed unconſcionable, becauſe a man ought not to have intereſt for his money and a collateral advantage beſides, nor may he clog the redemption with any bye agreement. So, where the plaintiff was the youngeſt ſon of his father, and the father being ſeized according to the cuſtom of the manor of *W.* of a copyhold tenement of the nature of *Borough Engliſh* of the value of 15 *l. per annum*, borrowed 200 *l.* of the defendant's father in *April* 1671. and, for ſecuring the ſame, made a conditional ſurrender into the hands of two cuſtomary tenants of the manor, to be void on payment of the 200 *l.* with intereſt in *April* 1672. And at the ſame time, the defendant's father entered into a bond, conditioned that, if the 200 *l.* and intereſt ſhould not be paid at the day, then, if the defendant's father ſhould, within ten days afterwards, pay him, his executors, adminiſtrators or aſſigns, the further ſum of 78 *l.* in full for the purchaſe of the premiſes, the bond ſhould be void, or otherwiſe ſhould ſtand in full force. The plaintiff's father died in 1671. before the mortgage was forfeited, leaving the plaintiff, an infant of two years old. The 200 *l.* with intereſt not being paid at the day, the defendant

Willett. *v.* Winnell. 1 Vern. 488.

ſendant paid the 78 *l.* the next day, when, according to the condition of the bond, the mortgage was forfeited to the adminiſtrator of the plantiff's father. The plaintiff's bill was to redeem on re-payment of the 200 *l.* with intereſt, diſcounting the profits. The defendant, by his anſwer, inſiſted it was an abſolute purchaſe, but the court decreed a redemption, not doubting but it continued a mortgage: and, as to the 78 *l*, declared *that* to be well paid to the adminiſtrator, and ordered the whole to be re-paid with *Coſts*, diſcounting the meſne profits.

So where *A.* the defendant, lent money to *B.* to carry on buildings, taking a mortgage from him to ſecure 16000 *l.* with legal intereſt; and, in another deed, executed at the ſame time, took a covenant from *B.* that he ſhould convey to the defendant, if he thought fit, ground rents to the value of ſixteen thouſand pounds at the rate of twenty years purchaſe; on a bill to redeem, the defendant inſiſted upon the agreement, but a redemption was decreed on payment of intereſt, principal and coſts, without regard thereto.

Jennings *et al'*. *v*. Ward. *et al'*. 2 Vern. 520.

Again, where the plaintiff being ſeized in fee of lands in queſtion worth 200 *l.* *per annum*, mortgaged the ſame in 1637. to the defendant's father for 250 *l*, and agreed,

Bowen *v*. Edwards 1 Rep. Ch. 222. 13 Car. 2.

and alſo ſealed a deed for the abſolute purchaſe thereof, if the money were not paid at end of ſeven years; a redemption was decreed notwithſtanding, for the defendant's father, having exhibited a bill againſt the plaintiff for the land or the money, made it evident that it was only a mortgage originally, and being ſo at firſt, the ſubſequent agreement could not alter it.

Nor will any ſubſequent agreement, entered into between the aſſignees of the mortgagee and other perſons to reſtrict the period of redemption, though creditors of the mortgagor, alter the nature of a contract, originally founded on a mortgage. Thus, where one creditor, (mortgaged lands, or the equity of redemption of them being ſubject to debts, and the mortgagee having exhibited a bill to redeem or be foreclоſed) undertook to redeem, entering into an agreement with the other creditors, that, if they paid him the money at a day appointed, they ſhould redeem, otherwiſe, the lands ſhould be his abſolutely. Though the creditors failed to pay the money at the time agreed upon, yet, upon a bill exhibited by them afterwards, a redemption was decreed.

Exton *v.* Greaves 1 Vern. 138. infra.

But although, Courts of Equity will not ſuffer the mortgagee to clog the redemption with any ſtipulation for a purchaſe, at a ſpe-

cific price agreed upon at the time of the loan, becauſe the admiſſion of ſuch a practice, would furniſh an inlet to great fraud and impoſition upon the mortgagor; yet, I apprehend, a mere agreement that, in caſe of ſale, an opportunity of pre-emption ſhould be given to the mortgagee, would be decreed good; but it muſt be claimed at a reaſonable time; for, where *A.* the plaintiff's brother died, having previouſly mortgaged lands to *B.* by deed, containing covenants to reconvey upon ſix months notice of payment of the principal and intereſt, and, that in caſe the eſtate ſhould be ſold, *B.* ſhould have the pre-emption, *B.* got the counterpart into his hands after *A*'s. death; then the plaintiff gave him ſix months notice that he would pay off the mortgage, which he refuſing to accept, the plaintiff exhibited his bill for a re-conveyance of his eſtate, having entered into articles for the ſale thereof. *B.* in his anſwer, inſiſted on the covenant for pre-emption; but, it appearing that, neither the plaintiff, or purchaſer knew any thing of this covenant, the counterpart of the deed having been in *B*'s. cuſtody; that the plaintiff on application for it had been denied it, the mortgagee inſiſting only on payment, alledging the ſecurity was too narrow for the money lent and threatening to foreclоſe, never having mentioned his claim to pre-emption until after the eſtate was ſold; it

Orby *v.* Trigg. 2 Eq. Ca. Abr. 599, 24. Sc. 9 Mod. Ca. in Law and Eq. 2.

was ſaid, he ought not to ſet it up to the prejudice of the purchaſor, having had time to claim it if he had pleaſed, before the eſtate was ſold, and it was decreed accordingly.

Barrel *v.* Sabine. 1 Vern. 268.

A diſtinction hath been made by the court of Chancery between contracts originally founded upon lending and borrowing of money with an agreement for a purchaſe in a certain event, and caſes, where, after a mortgage, a new agreement hath been entered into and executed by the parties for an abſolute purchaſe, although there be a ſubſequent declaration, that the mortgagor may have his eſtate upon payment of intereſt, principal and coſts; or, where a releaſe of the equity of redemption is given with a collateral agreement to reconvey, upon re-payment of the purchaſe-money; and, in the latter caſes it hath been determined that no re-purchaſe ſhall be had, unleſs upon ſtrict performance of the conditions ſtipulated.

Cotterel *v.* Purchaſe Ca. in Eq. Temp. Lord Talbot, 61.

Thus where *A*, a joint tenant with *B*. her ſiſter, made an abſolute conveyance to *C*. in fee for 104 *l*. which was admitted to be intended only as a mortgage; ſome time after, in 1708, thoſe deeds were cancelled, and then *A*, in conſideration of 184 *l*. (including the 104 *l*.) paid by *C*, conveyed the eſtate *ut ſupra*, but with a further covenant not to agree to any partition without *C*'s conſent. *B*. was in poſſeſſion

poſſeſſion till 1710, when *C*, ejecting her out of the moiety, enjoyed it quietly till 1726. at which time *A*. brought a bill for redemption, to which *C*. pleaded himſelf an abſolute purchaſor. The receipts given for the money mentioned it to be purchaſe-money. In 1710. there was an agreement that *A*. might have the eſtate again, if deſired, on payment of principal, intereſt and charges. It was firſt heard before the Maſter of the Rolls who diſmiſſed the bill. Afterwards it came on before Lord Chancellor *Talbot*, who obſerved the caſe was very dark; the firſt deed was admitted to be a mortgage, the ſecond was made in the ſame manner excepting the covenant reſpecting the partition, which was the darkeſt part of the caſe; for to ſuppoſe that it was an abſolute conveyance and to take a covenant from one who had nothing to do with the eſtate, made both the covenant and parties vague and ridiculous; but that it would be equally ſo, if the deed was ſuppoſed not to be an actual conveyance, ſo that it was of no great weight, and ought to be laid out of the queſtion. That he was inclined upon the whole to think the conveyance in 1708, was at firſt an abſolute conveyance. The agreement, in 1710, for the re-purchaſe, ſhewed it was not redeemable at firſt; the acquieſcence of ſixteen years under *C*'s. poſſeſſion, was a ſtrong evidence of it; and, his Lordſhip, upon the circumſtances of the caſe, affirmed his Honor's decree.

So,

Endſworth *v.* Griffith. 15 Vin. Abr. 468. Pl. 18. 2 Eq. Ca. Abr. 595. pl. 6. 1 Brown's Parl. Ca. 149.

So, where lands in *Wales* were mortgaged for 400*l.* and afterwards, neither principal or intereſt being paid at the time limited, the mortgagee brought an ejectment, got poſſeſſion of the premiſſes, and then obtained a releaſe of the equity of redemption from the mortgagor, upon payment of 350*l.* more; a note was given at the time of executing the releaſe, that the releaſee, on payment of the 750*l.* and all charges of repairs within a year by the releaſor, ſhould ſell and convey to him the premiſes. Payment having been neglected for ſixteen years, redemption was not allowed, the note being conſidered as an original agreement between the parties to ſell and convey the premiſes upon the terms therein mentioned, but not that the releaſor ſhould be at liberty to redeem the ſame.

We muſt remark here alſo that, if the tranſaction paſſes between perſons of the ſame family, and there appears upon the face of the contract, or in proof, an intention, in a certain event, to benefit the lender of the money, the contract will be conſidered as wearing a kind of double aſpect, and the court will ſupport the intention of the parties to turn a mortgage into a purchaſe in a certain event, though contrary to the general rule; for, in ſuch caſe, there is no danger of any fraud or practice againſt the mort-

gagor,

gagor, which is the miſchief intended to be prevented by a ſtrict obſervance of the maxim in equity, *that an eſtate cannot be a mortgage at one time, and an abſolute purchaſe at another.*

Thus where one ſeiſed in fee, in conſideration of 1000*l.* paid to him by a perſon that married his kinſwoman, conveyed to him and his heirs, and took a re-demiſe for ninety-nine years if he ſhould live ſo long, with a covenant therein that, if he ſhould pay 1000*l.* with the intereſt that ſhould be due for the ſame at any time *during his life*, the mortgagee ſhould reconvey to him and his heirs; and, *if the mortgagor did not pay the money, then his heirs, &c. ſhould have no power to redeem*, the mortgagor died, the money not being paid. His heir preferred a bill to redeem, and, at firſt, it was ſo decreed by Lord *Nottingham*. Afterwards the cauſe came on again, upon a demurrer to a bill of review, to reverſe that decree. It was argued for the demurrer, that an eſtate could not be a mortgage at one time, and afterwards become an abſolute purchaſe by one and the ſame deed; that the mortgagee, in this caſe, had a proper remedy, and might have made his eſtate abſolute in a legal courſe, by exhibiting a bill to forecloſe; but the court inclined to reverſe the decree.

Bonham *v.* Newcomb. 2 Vent. 364. 1 Vern. 7. 214. 232. 2 Ca. ch. 58.

And

1 Vern. 232. And this cauſe coming on *de integro*, the Lord *Keeper* adhered to his former opinion, that there ought to be no redemption; principally, becauſe it was *proved in the cauſe*, that the deſign of the mortgagor was to make a ſettlement by this mortgage, and that he intended a kindneſs and benefit to the mortgagee, in caſe he ſhould not think fit to redeem in his life time. And, as there was an expreſs covenant that the mortgagor might redeem at any time during his life, his Lordſhip thought he could not in equity have been debarred of that privilege, for, by a bill to foreclose a man, you could only bar him of his equitable title when his eſtate in law was become forfeited: but, when he had a a continuing title at law, as in this caſe, by an expreſs proviſo that he might redeem at any time during life, he thought equity could not have debarred him of that privilege. And therefore, ſeeing the mortgagee, in the preſent caſe, could not have compelled the mortgagor to redeem, and that the mortgagor might have lived ſo long as to have made it an ill bargain, then, when by contingency it happened to be a good bargain, there was no reaſon to raiſe an equity to take the eſtate from the mortgagee, eſpecially where there was a kindneſs and benefit intended him by the mortgagor. And Lord *Nottingham*'s decree was reverſed, and the reverſal

ſal afterwards affirmed in parliament held 1 & 2 *W.* and *M.*

So, if a man borrows money of his brother, and agrees to make him a mortgage, and, that if he has no iſſue male, he ſhall have the land; ſuch an agreement, *made out by proof*, might be decreed in equity. 1 Vern. 193.

Another exception hath been made to this general rule, namely, where a conditional conveyance is made, to be void upon payment of a ſum certain within a ſtipulated time, in contemplation of a ſettlement or family proviſion; as where *A*, ſeized of a copyhold in fee, ſurrendered it upon his marriage to the uſe of himſelf and his wife in ſpecial tail, remainder to her in fee, upon condition that, if he paid 50*l.* at a day certain to the daughter that the wife had, then, the whole ſurrender to be void. The day elapſed, the fifty pounds not paid, and the huſband died without iſſue. On a bill to redeem, brought by his heir againſt a purchaſer from the wife, the defendant pleaded, that he was a purchaſer for a valuable conſideration without notice; and it was reſolved, that this was not originally deſigned for a mortgage, but that, the party by ſettling it thus, had left it in his election, either to perform King *v.* Bromley. 2 Eq. Ca. Abr. 595. 8.

perform the condition by paying the money, or to let the ſettlement ſtand; he had choſen the latter, and the plea was allowed.

Sir Nich. Wolſton. *v.* Aſton. Hardreſs 511.

So where one, upon his marriage, covenanted that his wife ſhould be paid one thouſand pounds within two years after his death, and for performance thereof entered into a ſtatute; but who, prior to the covenant and ſtatute, had mortgaged part of the lands for five hundred pounds for certain years. Afterwards he deviſed theſe lands to his wife and her heirs, if the thouſand pounds were not paid to her according to the marriage covenant, ſhe paying off the ſaid 500 *l.* he died, leaving his wife executrix, to whoſe hands aſſets came; the 1000 *l.* not being paid to the wife, ſhe paid off the 500 *l.* and had the mortgage lands aſſigned to her. She then conveyed over the mortgage lands in fee by fine and deed. The queſtion was, whether the heir of the covenantor could redeem, paying the thouſand pounds and the five hundred pounds with intereſt upon diſcount of profits? And the Lord Chief Baron was of opinion he could not; for, the deviſe to the wife was abſolute, if the thouſand pounds were not paid at the time appointed.

A diſtinction hath been likewiſe taken, between mortgages, and defeaſable purchaſes, ſubject to re-purchaſes within a *time limited*, where the intereſt is taken by way of rent charge; for, in the latter caſes, the ſtipulations made between the parties muſt be ſtrictly adhered to, or the eſtate of the grantee will become abſolute. If it were otherwiſe, it would make property very precarious; for if, after the term agreed upon, the eſtate were to be conſidered as a redeemable intereſt, then, it would be only a perſonal eſtate; but, if conſidered as abſolute, it would be a freehold, and muſt be conveyed as ſuch. This would create great confuſion, and render it very difficult for perſons either to diſpoſe of ſuch property, or to ſettle what kind of conveyance was proper.

Thus where *I. S.* granted a rent charge in fee of 48 *l.* a year to *B*, upon condition, that if *I. S.* ſhould at any time give notice to pay in the conſideration money, (being 800 *l.*) by inſtalments, viz. 100 *l.* at the end of every ſix months, and ſhould purſuant to ſuch notice, pay the ſame and intereſt *at any time during his life time*, then the grant to be void. There was no covenant for *I. S.* to pay the money, and the rent charge was much leſs than what the intereſt came to, (intereſt being then 8 *per cent.*)

Floyer *v.* Levington. 1 Will. Rep. 268.

B. had conveyed it over after *I. S*'s. death to a *purchaſor with collateral ſecurity* for quiet ejoyment, and the *purchaſor* had afterwards made a marriage ſettlement upon it. The queſtion was, whether it was redeemable after ſixty years? And it was decreed, by Lord *Cooper*, that it was not. His Lordſhip obſerved, it was material that at the time of making the mortgage, intereſt was at 8 *per Cent.* the rent charge therefore was much leſs than the intereſt of the money, conſequently the payment of the rent charge could not be taken as the payment of the intereſt: that ſeveral circumſtances occurred in this caſe, which, though each of them ſingly might not be of force to bar the redemption, yet, joined together, were ſtrong enough to prevail over it; that *the mortgagee ſeemed to have allowed a conſideration* for purchaſing the equity of redemption after the death of the mortgagor; firſt, by taking the rent of 48 *l. per annum*, ſecondly, by agreeing to have his money by inſtalments, thirdly, by leaving it only at the election of the mortgagor whether he would redeem or not; that there could be no reaſon given why ſuch a contingent right of redemption might not, upon fair and reaſonable terms, be purchaſed; that length of time, where ſo great as in the preſent caſe, was a good bar of redemption of a rent charge, as well as of land; that

the mortgagor was not bound to pay the money by any covenant.

The Reporter obſerves upon the laſt caſe, that it was thought length of time was the principal objection to the redemption; but, in the caſe of *Mellor* v. *Lees*, which came on before Lord Chancellor *Hardwicke* upon an appeal from the Rolls, the doctrine that ſuch limited agreements for redemption, or rather re-purchaſe were legal, was confirmed. 2 Atk. 494.

In this caſe, a mortgage was made of an eſtate by the plaintiff's grandfather *Thomas Mellor*, in 1689, to *John* and *James Whitehead*; the *Whiteheads* afterwards, on the 5th of *June* 1689, mortgaged the ſame eſtate to *Cartwright* and *Heywood* and their heirs for ſecuring 200 *l.* to which *Thomas* and his ſon *John Mellor* were parties; and *Cartwright* and *Heywood*, in order to ſecure themſelves the intereſt, made a leaſe to the plaintiff's father and to his aſſigns, dated the 12th of *June* 1689, for five thouſands years, at the rate of 12 *l.* a year for the three firſt years, and 10*l.* a year for the remainder of the term; *and if, in the ſpace of three years*, the 200 *l.* was paid with intereſt, then the premiſes were to be re-conveyed. Receipts had been given ſometimes for intereſt, and ſometimes for a rent-charge; the laſt receipt was in 1730.

The 200 *l.* lent, was money left under one *Sutton's* will in 1687, and directed to be laid out in the purchaſe of lands in fee, in *Lancaſhire*, or *Cheſhire*; the rents to be applied towards cloathing twenty four aged and needy houſekeepers. The eſtate, at the time of the mortgage, was worth 500 *l.* only, but was now valued at 900 *l.* The plaintiff on the 20th *January* 1738, had given notice that he would pay in the money; but, the defendant a new truſtee of the charity, had refuſed to take it, inſiſting, that it was an abſolute purchaſe: And it was ſo decreed by *Forteſcue* Maſter of the Rolls, from which decree there was now an appeal made to the Chancellor.

His Lordſhip ſaid there were two general queſtions in the caſe. Firſt, as to the contract, whether the tranſaction was in its nature a mortgage, or a defeaſable purchaſe ſubject to a re-purchaſe? Secondly, whether if originally intended as a mortgage, length of time would not be a bar to redeeming?

As to the firſt, there was a difference between ſuch an agreement as this which related to a rent-charge iſſuing out of land, and an agreement which related to the land itſelf. So alſo the caſe of creating a rent-charge, and mortgaging a rent-charge were different conſiderations; when a man took a mortgage, the produce of the eſtate was not

not only barely adequate to the intereſt, or even to a perpetual payment of the intereſt, but generally was double the value of the intereſt of the money lent. If any fetters had been laid upon redeeming the mortgaged eſtate, *by an original agreement* either in the mortgage deed, or in a ſeparate deed, it would not have availed, *where it was done with a deſign to wreſt the eſtate fraudulently out of the hands of the mortgagor*. But what fraud or inconvenience was there in this caſe? The land itſelf was not parted with, but it was merely ſelling a rent-charge ſtrictly adequate to the conſideration given; and, inſtead of having a chance for the whole eſtate, the lender was contented to buy the intereſt for ever by way of rent-charge.

As to the particular agreement his Lordſhip ſaid that from that, and from the articles made in 1789, it appeared plainly to be the intention of the parties that, after the end of three years, the intereſt ſhould be changed into a rent-charge, and be irredeemable.

His Lordſhip further ſaid, it was material, that the money left to the charity and lent, was not to be laid out at intereſt, but to be inveſted in land in fee ſimple; ſo that the truſtees, being under an inability of treating in the common way,

put it in this method; and the will itſelf laid the foundation of the tranſaction, and cleared the defendants from the ſuggeſtion of oppreſſion and impoſition.

Likewiſe an eſſential circumſtance in this caſe was, that there was no covenant
1 Will. 271. in the deed for the repayment of the mortgage money; for though, in general, this was no rule againſt redemptions, here, it was explanatory of the whole ſcheme and intention of the parties. He did not found his opinion ſingly upon the nature of the contract, but alſo upon the great length of time elapſed, being 48 years. Not that the general rule of the court, (not to ſuffer a common and plain mortgage to be redeemed after the mortgagee had been in reception of the rents and profits a conſiſiderable time, becauſe it would be making him bailiff to the mortgagor and ſubject to an account,) applied forcibly in this caſe of a rent charge; there would be no ſuch inconvenience, for the perſon might eaſily account; but the value of property was greatly altered ſince 1689, therefore more might have been ſaid, if the redemption had been propoſed ſooner. His Lordſhip concluded by ſaying, the bill was properly diſmiſſed at the Rolls not ſo much upon general rules, as upon the particular circumſtances

ſtances of the caſe, and of the ſimilitude between it and that of *Floyer* v. *Levington*. Supra. Page 31.

It is to be obſerved upon the reaſoning in this caſe that, although Lord *Hardwicke* ſtated the length of time, as an additional reaſon in ſupport of this decree, yet, he only urged it as to its operation in altering the value of the property, and not as a preſumption of the grantor's having abandoned his right of redemption, if he had ever been intitled to it. And his Lordſhip principally determined upon the ſpecial circumſtances of the contract, for, as he juſtly obſerved, length of time was allowed to be a good objection to redemption, becauſe of the difficulty it laid upon the mortgagee of accounting, which, in the caſe of a rent-charge, did not exiſt. A diſtinction which had been taken before in the caſe of Lord *Widdrington* v. *Jennings* in Lord *Harcourt's* time, cited by Sir *Joſeph Jekyl* in *Floyer* and *Levington*, where the court took a difference between a mortgage of a rent-charge and of land, and allowed a redemption in the former caſe after eighty years.

Widdrington v. Jennings. 1 Will. Rep. 270.

And it ſeems from the determination in the caſe of *Taſburgh* and *Mc Namara*, v. Sir *Robert Echlin, et al'*. that ſuch a contract reſpecting lands, limiting the payment of the money advanced and intereſt thereupon

Taſburgh v. Echlin. *et al'*. 4 Brown's Par. Ca. 142.

to a particular period, would be conſidered in the nature of a conditional purchaſe, and no redemption allowed thereof, after the time ſtipulated.

This caſe came before the Houſe of Lords upon an appeal from a decree made by the Lord Chancellor of *Ireland*, in the year 1732, on the following circumſtances. *viz.*

King *James* I. by his letters patent under the great ſeal dated the 17th of *June* 1608, granted divers premiſes to *John King* and *John Bingley* and their aſſigns, for 116 years, to commence from the 18th of *May* then laſt paſt, at a certain yearly rent. The reſidue of which term, by deed dated the 26th of *May* 1677, became veſted in *John Taſburgh*, father of *Henry Taſburgh* the appellant in the cauſe.

King *Charles* the I. by his letters patent, dated the 25th of *March* 1647, granted the ſame premiſes to Sir *Maurice Euſtace* and his heirs at a like rent, but without reciting or taking any notice of the term of 116 years. Sir *Maurice*, by his will dated the 20th of *June*, 1665, deviſed the premiſes, *inter alia*, to his nephew Sir *John Euſtace* in fee; who, by virtue thereof, or as heir at law of the teſtator, became intitled to the reverſion and inheritance of the

premiſes, expectant on the determination of the term of 116 years.

The premiſes being only of the clear yearly value of 200 *l.* Sir *John*, in conſideration of 200 *l.* paid him by the ſaid *John Taſburgh*, did, by leaſe and releaſe dated the 30th and 31ſt of *May*, 1681, grant and convey the ſame to *Charles Taſburgh*, and his heirs, in truſt for *John Taſburgh*; in which indenture of releaſe, there was a proviſo to the following effect, *viz.* That if Sir *John Euſtace*, his heirs, executors, or adminiſtrators ſhould pay to *Charles Taſburgh*, his executors, adminiſtrators or aſſigns, at the end of five years to be accounted from the date of the releaſe, the ſum of 200 *l.* with full intereſt for the ſame, at the rate of 10 *l. per cent. per annum*, according to the cuſtom of the kingdom of *Ireland*; that then, it ſhould be lawful for him and his heirs, into the premiſes to re-enter, and the ſame to re-poſſeſs and enjoy as in his and their former right. But if Sir *John*, his heirs, executors or adminiſtrators ſhould fail in payment of the money with intereſt at the time limited, that then, the eſtate of the ſaid *Charles Taſburgh* ſhould be abſolute and indefeaſable, as well in equity as at law; and that Sir *John*, his heirs and aſſigns, ſhould, on failure of payment as aforeſaid, be for ever debarred from all right and relief in

equity, againſt the tenor of the ſaid releaſe. And Sir *John* did thereby, for himſelf and his heirs, releaſe unto *Charles Taſburgh*, his heirs and aſſigns for ever, all his right in equity to redeem the premiſes, in caſe of failure of payment as aforeſaid: and there was no covenant in the deed, on the part of the grantor, to repay the 200 *l.* or the intereſt thereof, as is uſual in mortgages.

The five years mentioned in the proviſo being elapſed, and no part of the 200 *l.* or the intereſt thereof having been paid; *John Taſburgh* (having no remedy at law to compel the payment, the eſtate being only a reverſion expectant upon the determination of a term of which there were then 43 years unexpired) exhibited a bill, in *April*, 1687, in the name of *Charles Taſburgh*, againſt Sir *John Euſtace*, ſetting forth the nature of the conveyance, and praying payment at a certain day, or that the conditional eſtate of *Charles Taſburgh* in the premiſes, (in caſe it ſhould be adjudged to be a defeaſable, or redeemable eſtate,) ſhould be made abſolute to him and his heirs. And that in that caſe, Sir *John Euſtace* might be foreclоſed of all right or equity of redemption of the premiſes, and might make farther abſolute conveyances and aſſurances to the ſaid *Charles Taſburgh*, according to

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the tenor and true meaning of the indentures of leaſe and releaſe.

Sir *John* being ſerved with a *ſubpœna* to anſwer this bill, ſtood out all proceſs of contempt to a ſequeſtration, and in *May*, 1688, appeared by his Six Clerk, and prayed a commiſſion for taking his anſwer in *England*, which was granted by conſent. But it was ordered that, unleſs the ſame was returned by the 22d of *June* following, the cauſe ſhould be ſet down to be heard, and the bill taken, *pro confeſſo*. Sir *John* having neglected to anſwer at the time limited, farther time was given him; but he ſtill neglecting to anſwer, a decree was made the 11th *December*, 1688, that he ſhould be foreclоſed, unleſs the principal, intereſt and coſts were paid before the 11 *December*, 1689.

Afterwards Sir *John Euſtace* returned to *Ireland*, and lived until the year 1706, when he died without iſſue; but he never took any one ſtep to impeach their proceedings or decree; or did he ever attempt to ſeek a redemption of the premiſes, but acquieſced under the decree for 18 years.

Henry Taſburgh the appellant, ſucceeded to this eſtate on the death of his father, in 1691, and entered thereupon. And not imagin-

imagining that, after an acquieſcence of 34 years under the decree, any perſon would ſet up a claim thereto under Sir *John Euſtace*, he by indenture, dated the 24th of *April*, 1722, in conſideration of a fine of 300 *l.* demiſed the ſame to the appellant *George M^c^Namara* for the term of 31 years, at the clear yearly rent of 250. *l.*

But, the value of lands in *Ireland* riſing conſiderably, a bill was exhibited in the court of chancery there, in *September* 1723, by ſeveral perſons in right of their wives, nieces and co-heireſſes of Sir *John Euſtace*, alledging, that the bill of foreclоſure was obtained by ſurpriſe, fraud and impoſition; and praying it might be reviewed and reverſed.

Afterwards, in *April* 1729, the appellant *Henry* put in a plea and anſwer to this bill, (which, having abated, they claimed a right to revive,) inſiſting on the title as before ſet forth; and farther pleading, the leaſe and releaſe executed, in 1681, by Sir *John Euſtace*, the declaration of truſt executed by *Charles Taſburgh*, the decree of foreclоſure, and the proceedings had in that cauſe, and the great length of time and acquieſcence under that decree. And *George M^c^Namara* denied notice of the reſpondents title, and inſiſted, that he was a purchaſer,

chaſer, for a valuable conſideration, of his ſaid term without any notice. But, it was decreed, that upon the reſpondents paying the appellant *Henry* the principal, intereſt and coſts due to him, he ſhould re-convey the ſame; and as to *M'Namara*, an iſſue was directed to be tried, whether he, at anytime, and when, had notice that the co-heireſſes of Sir *John Euſtace* had, or claimed any and what, right to the lands in queſtion, after the leaſe to *King* and *Bingley* ſhould expire.

From this decree the appeal was brought; it being inſiſted, on the part of the appellants, that, as the caſe was circumſtanced, there ought to be no redemption, upon any terms whatever; it having been expreſsly agreed by the releaſe in 1681, that, if the money was not paid within five years, the eſtate ſhould be irredeemable; it ought therefore to be conſidered as a conditional purchaſe, and the rather, becauſe there was no covenant to repay the money. That, as the appellant *Taſburgh*, or thoſe under whom he claimed, could not compel payment, it ought not to have been decreed a mortgage; for, in caſes of mortgages, the remedy ſhould be reciprocal, conſequently, no equity of redemption could ariſe or ſpring from the condition contained in the releaſe; for the ſuppoſed pledge was only a

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reverſion expectant on a long term of years, whereof no leſs than 43 were then to come, during which time it could yield no manner of fruit or profit. That the 200 *l.* was a ſufficient conſideration for the abſolute purchaſe according to the *then* value of lands in *Ireland*. That the decree, of the 11th *December* 1688, ought to be binding upon Sir *John Euſtace* and upon the reſpondents, as claiming under him. And, even ſuppoſing this to be the caſe of a mortgage clearly and undoubtedly redeemable, yet, conſidering the length of time that the mortgagor, and thoſe claiming under him, had acquieſced, without demanding ſuch redemption, and regard being had to the other circumſtances of the caſe, no redemption ought to be decreed.

To this it was anſwered by the reſpondents.—That upon the face of the deeds the tranſaction appeared to be a mortgage; that *John Taſburgh* underſtood it ſo to be, or he would not have brought his bill of foreclоſure. That, ſuch clauſes to reſtrain the redemption were always conſidered in equity, as terms extorted from the neceſſities of the borrower, and tending to uſury and oppreſſion; that the decree in 1688, was not binding or concluſive, being obtained in the abſence of Sir *John Euſtace*, without any defence, and in time of war

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and general confuſion; it was never compleated, or the account directed taken, or the order for foreclosure made abſolute.—As to the length of time, it was ſaid, that the firſt leaſe granted did not expire until 1724, which was *after* the firſt bill for redemption was brought; conſequently, *Taſburgh* could not be conſidered as a mortgagee in poſſeſſion, till after the expiration of that term; for, during its continuance, he was in poſſeſſion as a tenant, and not as a mortgagee. Beſides, Sir *John Euſtace* being in *England* from the time of making the mortgage till near his death, and in extreme poverty; and his heirs at law having been under coverture or infancy from that time, to the time of filing their bill, in 1723, which was before the reverſionary eſtate came into poſſeſſion, no laches or delay could reaſonably be imputed to them. As to *M'Namara*, it was ſaid to be proved by the reſpondents, that the premiſes were of the yearly value of 900*l*, and that the only conſideration for his leaſe was a fine of 300*l*, and an annual rent of 250*l*; and, that it appeared in the cauſe, that he had notice of the reſpondent's title, previous to his taking the leaſe; and that *covenants* were inſerted therein for bearing the loſs, in caſe of an eviction; for which reaſons it was hoped the appeal would be diſmiſſed with coſts.

But it was ordered and adjudged, that the proceedings, orders and decrees therein complained of, ſhould be reverſed, and the reſpondents bill diſmiſſed.

I thought it neceſſary to ſtate the reaſons offered by the parties to this appeal rather at large, becauſe, a ſatisfactory anſwer being given to the arguments of the appellants founded, upon the length of time that had elapſed ſince the decree for foreclosure, upon the decree itſelf, and upon the purchaſe of *Mc Namara*, the caſe appears to me to turn abſtractedly upon the queſtion of the legality or illegality of the proviſo for a re-purchaſe. And, indeed, if the order for foreclosure had even been made abſolute, I apprehend it would have made no difference in the caſe had the tranſaction been adjudged a mortgage, and the proviſo been conſidered by the Lords as inſerted with a view to reſtrain the equity of redemption; becauſe, in ſuch caſe, the orginal agreement would have been conſidered as fraudulent, and the artifice of adding the ſanction of the court to the tranſaction, would only have made the conduct of the parties appear in a more criminal view.

But, in all theſe caſes where the equity of redemption is rebutted by agreements of this kind, and the tranſaction is conſidered

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as a conditional purchaſe, the intention of the parties at the time of contracting muſt, I apprehend, be clearly proved or neceſſarily implied, from the circumſtances attending it, otherwiſe the general rule will not be departed from.

In the caſe of *Jaſon v. Eyres* it is ſaid, divers proofs touching parol declarations were offered and read on both ſides, which the court would take no notice of, but this point is now ſettled otherwiſe, mortgages not being conſidered as conveyances of land within the ſtatute of frauds. Thus, in the caſe of *Richards* againſt *Simms*, where the queſtion was, whether parol evidence could be given of the mortgagees having diſcharged the mortgagor from the debt; the fact, as ſworn, was, that, when the mortgagor went to the houſe of the mortgagee with the box of writings, wherein the mortgage and the bond were, and offered them to the mortgagee, the mortgagee put the deeds back and ſaid, *take back your writings, I freely forgive you the debt*; and then, ſpeaking to the mortgagor's mother who was preſent, ſaid, *I always told you I would be kind to your ſon, now you ſee I am as good as my word.* The Lord *Chancellor*, as to this evidence, obſerved the rule upon this head was the ſame in law and in equity; and his opinion

Bonham *v.* Newcomb. ſupra Page 27 *et vide* 2 Burr. 978.

Richards *v.* Simms. Barnard. 90.

nion was that it might be admitted. The ſtatute indeed laid down a very ſtrict but proper rule, relating to real eſtates, *viz.* that "*no intereſt*, any longer than for three years, ſhould paſs in them without writing, nor any truſt in them for a longer time, unleſs the truſt aroſe by operation of law." The ſame rule by that ſtatute related to the deviſing of real eſtates; but, in all theſe caſes, there was a difference both in law and equity, between abſolute eſtates in fee and for a term of years, and conditional eſtates for ſecuring the payment of a ſum or ſums of money. In the caſe of abſolute eſtates, it could not be admitted, that parol evidence of the gift of deeds, ſhould convey the lands themſelves; but, where a mortgage was made of an eſtate that was only conſidered as a ſecurity for money due, the land there was the accident attending upon the money, and when the debt was diſcharged the intereſt in the land followed of courſe. In law, the intereſt in the land was thereby defeated; in equity, a truſt aroſe for the benefit of the mortgagor. In an ejectment where a title was made under a mortgage, if evidence was given that the debt was ſatisfied, this was conſidered as defeating the eſtate which the mortgagee had in the land; and in ſuch caſes, eſpecially where the mortgage was ancient, the court would preſume that the money was paid at the day,

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and would direct the jury to give their verdict accordingly, unleſs it clearly appeared that the money could not be paid at the day; no writing was in theſe caſes neceſſary, which ſhewed that, even at law, the debt was conſidered as the principal and the land only the accident. Equity went farther, and in all caſes ſaid that, when the debt appeared to be ſatisfied, there aroſe a truſt by operation of law for the benefit of the mortgagor. This caſe was within the exception in the ſtatute of frauds, which had been mentioned, as to truſts ariſing by operation of law; and in theſe ſort of caſes the court received any kind of evidence of payment: therefore, if a mortgage was made by one partner to another, and the mortgagor agreed with the mortgagee that he ſhould take a certain part of the profits of the partnerſhip in diſcharge of the mortgage, that of itſelf would diſcharge it. Here was a mortgage made, and a bond at the ſame time entered into for performance of covenants. Suppoſe an obligee delivered up a bond with intent to diſcharge a debt, the debt would certainly be thereby diſcharged; and, if the bond was diſcharged in the preſent caſe, the mortgage would be diſcharged with it; his Lordſhip directed an iſſue to try whether theſe expreſſions were uſed or not, the evidence as to this point being doubtful.

Hampton *v.* Spencer *et e. cont.* 2. Vern. 288.

So where *H*, in conſideration of 80*l.* paid by the defendant *S*, conveyed an houſe and ſurrendered a copyhold eſtate to him and his heirs; the bill was for a reconveyance on payment of the remainder due of the 80*l.* and intereſt. The defendant, by anſwer, inſiſted, that the conveyance was abſolute to him and his heirs, without any proviſo, clauſe, or agreement that the plaintiff might redeem; but confeſſed it was in truſt that, after the 80*l.* with intereſt was paid, the defendant *ſhould ſtand ſeized for the benefit of the plaintiffs wife and children*, although no ſuch truſt was declared in writing. For the plaintiff it was inſiſted, that he, having replied to the defendant's anſwer *who had not made any proof of ſuch pretended truſt*, was bound by his confeſſion, *that he was not to have the eſtate abſolutely to himſelf*, and that no regard ought to be had to the matter ſet forth in avoidance of the plaintiff's demand, becauſe the defendant had not proved it. *But the court decreed the truſt for the benefit of the wife and children.*

Robinſon *v.* Gee. 1 Vez. 251.

But, in the caſe of *Robinſon* v. *Gee*, Lord *Hardwicke* was of opinion, parol evidence could not be admitted as to an agreement between *Co-mortgagors*, to charge the lands otherwiſe than they would have been affected by the operation of law upon the contract.

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That caſe, as to the point in queſtion, was thus: *A.* tenant in tail, remainder to his brother in tail with other remainders, wanting to raiſe money to diſcharge debts on the eſtate, propoſed to *B.* to join in a mortgage, which was agreed to and done; both joined in the bond, but *A*, being firſt named, received the money. The remainder being veſted in poſſeſſion in *B*; on the death of *A*, the creditors of *A.* brought a bill to turn the mortgage and intereſt on the eſtate of *B.* and to exonerate the perſonal eſtate of *A.* Parol evidence was offered of a particular agreement between the brothers that this debt ſhould reſt intirely upon the eſtate of *B*: this was objected to as not being proper evidence within the ſtatute of frauds, becauſe only parol; whereas, this being a real right annexed to a real eſtate, ſuch an agreement could not be proved without writing. Lord *Hardwicke* obſerved, as to this part of the caſe, that, as to the parol evidence, it was not neceſſary to give an abſolute opinion, but, he doubted whether it would be good. This was certainly a kind of real right, being to affect a real eſtate *in all events* contrary to the writing, and to rebut the equity. Before the caſe of *Brown* v. *Selwin*, it was held in ſeveral caſes, that parol evidence might be given to rebut an equity, although relating to a real right; but, in that which was the caſe of a will, the Lords held otherwiſe: from which

1 Vez. 253.

Brown v. Selwin. Caſe temp. Talbot 240. S. C. 4 Brown's Parl. Ca. 179. Forreſter 243. 2 Eq. Abr. 464.

which determination, going farther than any had ever gone before his Lordſhip did indeed differ in opinion; his Lordſhip ſaid the equity *there* was that, two perſons being made executors and *reſiduary Legatees*, and one of them being indebted to the teſtator to the amount of 3000 *l*, the latter inſiſted his debt was thereby extinguiſhed, the former affirmed the contrary, and claimed a moiety of the 3000 *l* as one of the *reſiduary Legatees*. The former offered parol proof of his being made an executor by the teſtator with intent to extinguiſh that debt, but the Lords would not ſuffer it to be read; and his Lordſhip ſaid this was a ſtronger caſe than that, then under conſideration; but, even ſuppoſing this evidence might be read, his Lordſhip thought it was not ſufficient to prove what it was brought for.

We muſt here obſerve the evident diſtinction between the laſt caſe and thoſe of *Richards* and *Symms*, and *Hampton* and *Spencer*; and alſo between theſe caſes and that of *Brown* and *Selwin* referred to by Lord *Hardwicke*; which laſt, I apprehend, turned upon a different point and was not governed by the ſtatute of frauds: for, in the caſes of *Richards* and *Symms*, and *Hampton* and *Spencer*, the queſtion, as to admiſſion of parol evidence, aroſe between the mortgagors and mortgagees or their repreſentatives; but,

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in the laſt caſe, the queſtion was between the creditors of a joint mortgagor and his co-mortgagor, the latter of whom, in law, independent of any parol agreement, was conſidered only as a collateral ſecurity: but, if the parol agreement had been admitted in evidence, it would have charged the eſtate of the latter, which would not otherwiſe have been affected, if the deceaſed mortgagor had left aſſets. Conſequently, the ground of admitting parol evidence in the former caſe does not exiſt in the latter; for the court, in the former caſe, conſidered the eſſence of the contract as a negotiation for a loan, the land as pledged collaterally to ſecure the payment of it; that therefore any evidence which explained, impeached, or diſcharged the perſonal contract for a loan affected the land, not directly but *conſequentially* only. *Ex. Gra.* if the money borrowed was paid or the debt diſcharged, the lien upon the land, which was only to ſecure that, determined; in equity therefore, it was from thenceforth held in truſt for the mortgagor. But, in the caſe of *Robinſon* and *Gee*, the evidence offered went directly to affect the lands in the hands of the ſurviving mortgagor with a parol agreement, contrary to the ſtatute of frauds, made in contemplation of a mortgage it is true; but totally irrelative to the contract for the loan between the mortgagor and mortgagee, to

which, in the former caſe, the evidence offered was conſidered to apply directly, and by affecting that, to affect the land indirectly and conſequentially: and, in the caſe of *Brown* and *Selwin*, the object was to procure the admiſſion of parol evidence to ſhew that, the teſtator intended words in his will to operate otherwiſe than they would do if taken according to their ordinary import, contrary to a ſettled rule of law that, where a will or inſtrument explains itſelf, no evidence out of it ſhall be admitted; but the intention ſhall be collected from the written words; for, even in the caſe of an ambiguity on the face of a deed or will, it is clear law, that it can never be helped by averment; becauſe the law will not couple and mingle matter of ſpecialty which is of higher nature, with matter of averment which is of inferior account; for, that would be to make all deeds doubtful and ſubject to averments, and ſo, in effect, things to paſs without deed, which the law appointeth ſhall not paſs but by deed. And, therefore, if a man give land in tail, (though it be by will,) the remainder in tail, and add a proviſo to reſtrain alienation and create a perpetuity; it cannot be averred and proved, upon the ambiguity of the reference in this clauſe, that the intent of the deviſor was, that the reſtraint ſhould go only to him in remainder and the heirs of his body, and that the tenant

2 Mod. 11.
Ibid. 159.
Cheyney's caſe.
5 Co. 67.
2 Vern. 337.
Ibid. 625.

tenant in tail in poſſeſſion was meant to be at large; it being a fixed maxim, that all ambiguity of words ariſing from matter within a deed or inſtrument, may be holpen by conſtruction, or in ſome caſes by election, but never by averment.

Indeed, there are caſes, in which parol evidence is admitted to ſhew the intention of a teſtator or deviſor; but thoſe caſes are *not* where the ambiguity appears upon the deed or inſtrument, but, where there is ſome collateral matter out of the deed which giveth riſe to it; as where a man bequeaths a legacy or deviſes an eſtate to *J. S.* the ſon of *N*, and *N.* hath two ſons of that name; it is clear, upon the face of the will, that the donor meant a benefit to *J. S.* the ſon of *N.* yet, an ambiguity ariſes out of the deed, from *N.*'s having two ſons of that name, that renders it doubtful which of them was intended to be benefitted; to remove which doubt, parol evidence may be admitted.

So, where a man gave his wife a legacy of 1000 *l*, and, as to the reſidue of his real eſtate, (except one cloſe in his will bequeathed to a charity,) deviſed it to her and her heirs, in truſt to ſell the ſame, or ſo much thereof as ſhould be needful, for payment of his debts and legacies; and alſo gave all his perſonal eſtate to her towards

Dockſey *v.* Dockſey. wid. and executrix. 1 Brown's Parl. Ca. 324. 2 Eq. Ca. Abr. 415. Ca. 4. 430 c. 8. 507 c. 1. Dutcheſs of Beaufort *v.*

Lady Granville et al.' 1 Brown's Parl.Ca. 305. Sc. 1 Wms. 114. Sc. 2 Vern. 648.

payment of his debts and legacies, and made her executrix; the queſtion was, whether here was an implied or reſulting truſt in the executrix, as to the reſidue after his *debts* and *legacies* paid, for the benefit of the heir; and parol evidence was admitted to ſhew that, it was the teſtator's intention, this ſhould be a beneficial deviſe to the wife and executrix.

It is obſervable in this, as in the preceding caſe, that the ambiguity ariſes from a circumſtance out of the will, and not upon the face of it; *viz.* the wife's being capable of taking the bequeſts given by the teſtator in two capacities, as legatee to her own uſe, and as executrix in truſt for the next of kin; and, it being doubtful which way ſhe was intended to take by the teſtator, becauſe it was *primâ facie* reaſonable to preſume he would not have given her part as a legatee, if he had meant to give her the whole reſidue beneficially as executrix, for the latter bequeſt would have involved in it the former, therefore, as there was no doubt but that ſhe took the whole by the will, the only queſtion was, in what capacity ſhe took it. And it is like a bequeſt of 50*l.* to *J. S.* and 100*l.* to *J. S.* ſons of *A. B*, in which caſe, there can be no doubt but parol evidence would be admitted to prove, which ſon was meant to have the greater and

which the leſſer legacy; the only difference being that, in the latter caſe, the bequeſt would be to two perſons in their natural capacities; whereas, in the former it is to one perſon capable of taking in two diſtinct capacities, the one natural, the other artificial.

But, in the caſe of *Brown* and *Selwin*, there was a plain and expreſs deviſe of a moiety of every part of the teſtator's perſonal eſtate, not before diſpoſed of, to the co-executor, *of which*, the debt to the teſtator was indiſputably part. Therefore no doubt aroſe, as to the bequeſt, by matter out of the will; but, the intent was to deſtroy the force of the written will and overturn the plain words of it by parol evidence only; and not to obviate or take off an implication, which might or might not take place, and yet the words of the will have their force and operation; nor was it to anſwer any rule or conſtruction of equity ariſing upon, or conſiſtent with the words of the will, but, to controul and take away a plain deviſe and expreſs gift to the co-executor.

Nor do I apprehend either of theſe caſes interfere with the reſolutions that have been made, as to admitting parol evidence on agreements reſpecting lands; thoſe caſes depending

2 Vern. 506.
2 Freem. 284.
2 Will. 620.
2 Eq. Ca. Abr. 482.
1 Vez. 251.

depending upon another principle, *viz.* that of the juriſdiction of equity where there is fraud. As where an agreement for a mortgage was drawn by the mortgagee, the mortgagor being able to write his mark only, and the mortgagee omitted to inſert a covenant for redemption; in which caſe, on a bill to foreclose, the court permitted the mortgagor to read evidence to ſhew the omiſſion.

3 Atk. 389.

So, where a mortgage was drawn in two deeds, one an abſolute conveyance, the other a defeazance, and the mortgagee omitted to execute the defeazance, the mortgagor was permitted to ſhew the miſtake.

3 Atk. 389. Prec. Ch. 526.

Again, where an abſolute conveyance was made for a ſum of money, and the perſon to whom it was made, inſtead of entering and receiving the profits, demanded intereſt for his money and had it paid him; this was admitted as evidence to explain the nature of the conveyance.

Ibid.

For, in ſuch caſes, the proof offered is not conſidered as a variation of the agreement, but explanatory only of what it was meant to have been; and the allowing any other conſtruction upon the ſtatute of frauds and perjuries, would be to make it a guard and protection to fraud, inſtead of a ſecurity againſt it, as was the intention of it.

Another

Another exception likewiſe deſerves our attention in ſpeaking of this ſtatute, and that is, in caſes of ſecret truſts of eſtates that do not appear upon the face of the deeds whereby they are conveyed, but are admitted by the truſtee; for ſuch caſes, being out of the miſchief, are conſidered, in equity, as not having been in contemplation of the legiſlature on paſſing that ſtatute.

Hampton v. Spencer. Supra. 50.

CAP. III.

Of the Intereſt of a Mortgagor in the Premiſes mortgaged by him.

2 Blackſt. Com. 158.

AS ſoon as the eſtate of the mortgagee is created, which is now done, either by leaſe and releaſe, bargain and ſale, or more frequently by creation of a term for years in the premiſes, he may immediately enter upon the lands, but ſubject to be diſpoſſeſſed upon performance of the condition, by payment of the mortgage money, at the day limited. The uſual way therefore, as hath been ſaid, is to agree that the mortgagor ſhall hold the land till the day aſſigned for payment, and that the mortgagee ſhall not intermeddle with the poſſeſſion until default therein. And in caſe of failure, whereby the eſtate becomes abſolute, the mortgagee may enter upon it, and take poſſeſſion, without any poſſibility at law of being afterwards evicted by the mortgagor.

Some

Some doubts have ariſen, what eſtate the mortgagor has in the land from the time of making the mortgage, under ſuch an agreement that the mortgagee ſhall not intermeddle with the poſſeſſion until default of payment; whether he be leſſee for ſo many years, or only in as tenant at will, or by ſufferance.

Powſeley *v.* Blackman. 2 Cro. 659.

And, in the caſe of *Powſeley* and *Blackman*, where a mortgage was made by bargain and ſale with a proviſo and agreement between the parties, that the mortgagee, his heirs, or aſſigns ſhould not intermeddle with the actual poſſeſſion of the premiſes, or perception of the rents thereof, until default of payment, which was to be made at the diſtance of ſome years. It was held by the court, that he was tenant at will; a diſtinction being taken between this agreement, and an agreement with the mortgagee that he ſhould enjoy it during thoſe years; for the latter would have amounted to a leaſe for years.

5 H. 7. 1. 21 H. 7. 36.

But although, *primâ facie*, there is a reſemblance between the eſtate of a mortgagor left in poſſeſſion of the premiſes under ſuch an agreement or otherwiſe, and a tenancy at will; yet, upon a minute and accurate inſpection, a clear diſtinction will be found between theſe intereſts; and alſo,

between

between the caſe of a mortgagor in actual poſſeſſion, and one who under-lets to tenants: for, by the agreement underſtood between the mortgagors and mortgagees, the latter ſtipulate to receive intereſt, the former to keep poſſeſſion; but no rent is reſerved from the mortgagor, nor is he intitled to notice to quit; he hath not even a right to the emblements, each of which are properties appertaining to a tenancy at will in the ſtrict ſenſe of the word: and the reaſon is, becauſe, in this caſe, the *crop* as well as the land, is a ſecurity for the debt.

But, in both caſes, even the ſimilitude ceaſes, if there be an under-tenant; for there can be no ſuch thing as an under-tenant to a tenant at will; ſuch demiſe being in itſelf a deſertion, which, in law, amounts to a determination of the will.

2 Cro. 660. 3 Ibid. 303, 304, 305. In ſuch caſe, it ſeems, the mortgagee may conſider the mortgagor as a diſſeiſor, and his leſſee as a wrong-doer or not, at his election.

1 Atk. 606. If the mortgagee permits the leſſee to enjoy his leaſe, the mortgagor may, from thenceforth, be conſidered as a receiver of the rent, or, in ſome ſort, a truſtee for the mortgagee, who may, at any time, countermand the implied authority, by giving notice

notice to the tenant not to pay the rent to the mortgagor any longer.

But, if the mortgagor elects the other alternative, the leſſee may be turned out by an ejectment, he being in under a perſon who had no power to under-let, but ſubject to eviction by the mortgagee.

Keech Leſſee of Warne againſt Hall, and another. Douglas's Rep. 21.

And ſo it was held, by the Court of King's-Bench, in the caſe of *Keech* leſſee of *Warne* againſt *Hall* and another; where an ejectment was brought for a warehouſe in *London*, by a mortgagee, againſt a leſſee under a leaſe in writing for ſeven years, made after the date of the mortgage by the mortgagor, who had continued in poſſeſſion; the leaſe was at a rack rent. The mortgagee had not notice of the leaſe, nor the leſſee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought; the plaintiff was willing to ſuffer the defendant to redeem. There was no notice to quit, ſo that, although the written leaſe was bad, yet if the leſſee was to be conſidered as tenant at will from year to year by conſtruction, the plaintiff's action muſt fail. The queſtion was, whether by the agreement underſtood between mortgagors and mortgagees, which was, that the latter ſhould receive intereſts, and the former keep poſſeſſion, the

mortgagee had given an implied authority to the mortgagor to let from year to year at a rack rent, or, whether he might not treat the defendant as a treſpaſſer, and wrong-doer? And Lord *Mansfield* ſaid, in delivering the opinion of the court, that on full conſideration, they were all clearly of opinion, that there was no inference of fraud or conſent againſt the mortgagee, to prevent him from conſidering the leſſee as a wrong-doer. It was rightly admitted, that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; but here the queſtion turned upon the agreement between the mortgagor and mortgagee. When the mortgagor was left in poſſeſſion, the true inference to be drawn was an agreement that he ſhould poſſeſs the premiſes at will *in the ſtricteſt ſenſe*; and therefore no notice was given him to quit; and he was not even intitled to reap the crop, as other tenants at will were; becauſe all was liable to the debt, on payment of which, the mortgagee's title ceaſed. The mortgagor had no power, expreſs or implied, to let leaſes not ſubject to every circumſtance of the mortgage. If, by implication, the mortgagor had ſuch a power, it muſt go to a great extent, to leaſes where a fine was taken on a renewal for lives. The tenant ſtood exactly in the ſituation of the mortgagor.

The

The poſſeſſion of the mortgagor could not be conſidered as holding out a falſe appearance. It did not induce a belief that there was no mortgage, for it was the nature of the tranſaction, that the mortgagor ſhould continue in poſſeſſion. Whoever wanted to be ſecure when he took a leaſe, ſhould inquire after and examine the title deeds. In practice indeed, eſpecially in the caſe of great eſtates, that was not often done, becauſe the tenant relied on the honor of his landlord; but whenever one of two innocent perſons muſt be a loſer, the rule was *qui prior eſt tempore, potior eſt jure*. If one muſt ſuffer, it muſt be he who had not uſed due diligence in looking into the title. It was ſaid at the bar, that if the plaintiff, in a caſe like this, could recover, he would alſo be intitled to the meſne profits from the tenant in an action of treſpaſs; which would be a manifeſt hardſhip and injuſtice, as the tenant would then pay the rent twice. His Lordſhip gave no opinion on that point, but there might be a diſtinction, for the mortgagor might be conſidered as receiving the rents in order to pay the intereſt, by an implied authority from the mortgagee till he determined his will. As to the leſſee's right to reap the corn, which he might have ſown previous to the determination of the will; that point did not ariſe in this caſe, the ejectment being for a

warehouſe; but however that might be no bar to the mortgagee's recovering in ejectment, it would only give the leſſee right of ingreſs and egreſs to take the crop; as to which, with regard to tenants at will, the text of *Littleton* was clear.

But there ſeems to be no occaſion, in this caſe, for any implication of an authority from the mortgagee to the mortgagor to receive the rents and profits. For although the poſſeſſion of the leſſee of the mortgagor under a leaſe from him will make him a wrong-doer as to the mortgagee, his leſſor being, as to the mortgagee, a diſſeiſor, and conſequently incapable of conveying a good title as againſt the mortgagee: yet, I apprehend, the leſſee will not be in a worſe caſe than a tenant under a diſſeiſor, which, by granting the underleaſe, the mortgagor hath made himſelf at the election of the mortgagee. And a diſtinction hath been taken between the caſe of the diſſeiſor, and that of him who comes in under the diſſeiſor by title; for if a man be diſſeiſed, and the diſſeiſor, during the diſſeiſin, cuts down the trees, or graſs, or the corn growing upon the land, and afterwards the diſſeiſee re-enters, the diſſeiſee ſhall have an action of treſpaſs againſt him *vi et armis* for the trees, graſs, corn, &c. for, after his regreſs, the law,

Lifford's caſe. 11 Co. 51.

as

as to the diſſeiſor and his ſervants, ſuppoſes the freehold always continued in the diſſeiſee. But, if the diſſeiſor makes a feoffment in fee, gift in tail, leaſe for life, or years, and afterwards the diſſeiſee re-enters, he ſhall not have treſpaſs *vi et armis* againſt thoſe who come in by title; for this fiction of the law, that the freehold continued always in the diſſeiſee, ſhall not have relation to make him, who comes in by title, a wrong-doer *vi et armis*, becauſe, in *fictione juris ſemper æquitas exiſtit*. But, in ſuch caſe, the diſſeiſee ſhall recover all the meſne profits againſt the diſſeiſor, in the ſame manner as the diſſeiſee ſhould recover in an aſſize at the common law before the ſtatute of *Glouceſter*, *cap.* 1. damages only againſt the diſſeiſor: beſides it is to be preſumed, that he who comes in by title has given ſome recompence to the diſſeiſor, and that the leſſee has paid rent to him or other conſideration, and therefore, in reaſon, the diſſeiſor is to be charged with the whole.

But, as to the right to the emblements, a diſtinction is taken between tenants who have particular eſtates that are uncertain, defeazable by the act of the parties to the original contract, or by the act of God; and thoſe who have particular eſtates uncertain, defeazable by a right *paramount*;

for, in the latter caſe, he that hath the right paramount ſhall have the emblements; as although, *quoad actionem*, the law will not by a fiction make the leſſee, who comes in by title, liable to puniſhment as treſpaſſor; yet, *quoad proprietatem*, the regreſs of the diſſeiſee re-veſts the property in him, as well for the emblements as for the freehold itſelf, and equally againſt the feoffee or leſſee of the diſſeiſor, as againſt the diſſeiſor himſelf. For the rule and reaſon of the law is, that after the regreſs of the diſſeiſee, the law adjudges that the freehold has continued in him, which rule and reaſon extends as well to the emblements, as to the freehold; and, although the act of the diſſeiſor may *alter* a man's action, yet, his act cannot *take away* his action, property, or right.

And the law is the ſame, if the feoffee or leſſee ſows the land, or cuts down trees or graſs, and ſevers and carries away, or ſells them to another. Yet, after the regreſs of the diſſeiſee, he may take the corn, as well as the trees and graſs, from whatſoever place they are carried to; for the regreſs of the diſſeiſee has relation, as to the property, to continue the freehold againſt them all in the diſſeiſee *ab initio*, nor can the carrying them off the land alter the property; and if

the diſſeiſee takes them, they ſhall be recovered in damages to the diſſeiſor.

Nor do I ſee any ground upon which the caſe of a tenant under a mortgagor can be diſtinguiſhed, as to the right of emblements, from any other tenant under a tortious title; for, if he be conſidered as a wrong-doer as to his occupation of the premiſes, he cannot be conſidered in a different character as to the emblements: nor is there any room to imply a conſent to cultivate the property, when no implication is admitted of a conſent to occupy it. As, if an authority can be implied in the mortgagor from the mortgagee to permit the cultivation, the ſame principle, by analogy, will juſtify ſuch an implication that he had an authority to demiſe, which in the principal caſe was not admitted.

But ſuch leaſe will be good againſt the mortgagor and all ſtrangers, and will intitle the leſſee to the equity of redemption. Rand *v.* Cartwright. 1 Ch. Ca. 59. et vid. 3 Cro. 304.

It is a ſettled doctrine, in a court of equity, that a mortgagor in poſſeſſion cannot bar a mortgagee by a fine and non-claim; for, although the mortgagee be in reality out of poſſeſſion, yet, where that is done by the conſent of both parties, and the nature of the contract requires that it ſhould be ſo while the intereſt is paid, 1 Vent. 82. 1 Lev. 272. 2 Vez. 482. Hard. 402. Noy's Rep. 23. Firmer's Ca. 3 Cro. Cruiſe on Fines 233.

it would be againſt the original deſign of the contract, that any act of the mortgagor, except the payment of the money and intereſt, ſhould deprive the mortgagee of his ſecurity.

Porter. *v.* Emery. 1 Ch. Rep. 97.

A recovery ſuffered by a mortgagor tenant in tail, lets in all precedent incumbrances.

Goddard *v.* Complin. 1 Ch. Ca. 119.

Thus where tenant in tail demiſed lands for 99 years by way of mortgage, and then married, and ſuffered a recovery to enable him to make a jointure; one queſtion was, whether the recovery ſhould enure to make good the mortgage, it being deſigned for the marriage ſettlement only? And it was determined that it ſhould; for, if no recovery had been, there could have been no jointure, and the jointreſs could not have avoided the mortgage; ſhe was in by the act of her huſband, and no ſubſequent act of his could avoid his own act precedent: and, though the recovery was ſuffered to a collateral purpoſe, yet, it would enure to make good all precedent acts and incumbrances.

Doug. Rep, 610.

A mortgagor in poſſeſſion gains a ſettlement, becauſe the mortgagee, notwithſtanding the form, has but a chattel, the mortgage being only a pledge to him for ſecurity of his money; and the original owner-

ownerſhip of the land ſtill reſiding in the mortgagor, ſubject only to the legal title of the mortgagee, ſo far as ſuch title is requiſite to the end of his ſecurity.

The methods of redemption and foreclоſing being found dilatory, expenſive, and inconvenient, not only to the mortgagee but alſo to the mortgagor, the legiſlature deemed it neceſſary to interfere, and in ſome degree remedied it by the 7 *Geo.* 2. *c.* 20. by which ſtatute it was provided, that, after payment or tender by the mortgagor of principal, intereſt, and coſts, the mortgagee ſhall maintain no ejectment, but may be compelled to re-aſſign his ſecurities, and deliver all deeds, evidences and writings in his cuſtody reſpecting the mortgaged premiſes to the mortgagor. And that, where a bill is filed to redeem or be foreclоſed, the court may, upon application by the defendant, and upon his admitting the right and title of the plaintiff in the ſuit, before ſuch ſuit be brought to hearing, make ſuch order or decree therein, as would have been made in caſe ſuch ſuit had then been regularly brought to hearing before ſuch court.

But it is provided, that this act ſhall not extend to any caſe where the perſon againſt whom the redemption is prayed, ſhall (by writing under his hand, or the

hand of his attorney, agent, or ſolicitor, to be delivered before the money ſhall be brought into ſuch court of law, to the attorney or ſolicitor for the other ſide, inſiſt, either that the party praying a redemption has not a right to redeem; or that the premiſes are chargeable with other, or different principal ſums than what appear on the face of the mortgage, or ſhall be admitted on the other ſide; nor to any caſe where the right of redemption to the mortgaged lands and premiſes in queſtion in any cauſe or ſuit, ſhall be controverted or queſtioned by, or between, different defendants in the ſame cauſe or ſuit; nor ſhall be any prejudice to any ſubſequent mortgagee or incumbrancer.

By the 7 *W.* & *M. C.* 25, it is enacted, "that no perſon ſhall be allowed to have any vote in election of members to ſerve in parliament, for, or by, reaſon of any truſt eſtate or mortgage, unleſs ſuch truſtee or mortgagee be in actual poſſeſſion, or receipt of the rents and profits of the ſame eſtate; but that the mortgagor or *ceſtui que truſt* in poſſeſſion, ſhall and may vote for the ſame notwithſtanding ſuch mortgage or truſt".

CAP. IV.

Of the Eſtate of the Mortgagee.

TO form an accurate idea of the nature of the intereſt of a mortgagee in the eſtate pledged as a ſecurity, he muſt be viewed at four periods of time.

Firſt. At the inſtant of executing the mortgage, and before forfeiture, while poſſeſſion is (as is uſually the caſe) in the mortgagor.

Secondly. After the mortgage is forfeited by non-payment of the money at the day, and before the mortgagee enters into poſſeſſion.

Thirdly. After the mortgagee enters into poſſeſſion on the eviction of the mortgagor.

And, Fourthly. On foreclosure, of which we ſhall ſpeak at large hereafter.

The

The eſtate of the mortgagee, until forfeiture, ſtill continues as it was at common law, before the interference of courts of equity: he is intitled to an eſtate as tenant in mortgage in fee, or for term of years, ſubject to any agreement made between him and the mortgagor relative to the poſſeſſion, and defeazable at law by performance of the condition. As ſoon as the eſtate is created he may enter into poſſeſſion; but as the payment of the intereſt is the principal object of the mortgagee, he ſeldom avails himſelf of that right, unleſs obliged ſo to do to ſecure payment of the intereſt, or with a view to compel the repayment of the money.

Keech *v.* Hall. Supra. 63.

It follows from hence that all leaſes or other intereſts in the land, made or conveyed by the mortgagor ſubſequent to the mortgage, though, before forfeiture, are void againſt the mortgagee. As to him, the tenants under ſuch leaſes, or perſons claiming ſuch intereſts may be conſidered as treſpaſſors, diſſeiſors, and wrong-doers.

On the ſame principle, the mortgagee, (ſince the ſtatute 4 *Ann*, c. 16. to diſpenſe with the neceſſity of attornment of tenants) on notice, becomes intitled to the rent of the premiſes mortgaged, (if let) from the time of executing the conveyance; for

for the rents and profits are liable to the debt as well as the premiſes themſelves.

This was determined in the caſe of *Moſs* againſt *Gallimore* and another, upon a ſpecial caſe reſerved in an action of treſpaſs at the Aſſiſes for *Staffordſhire*. The caſe was as follows; one *Harriſon*, being ſeized in fee, on the firſt of *January*, 1772, demiſed certain premiſes to the plaintiff *Moſs* for twenty years at the rent of 40 *l.* payable yearly on the 12th *May*; and in *May* 1772 he mortgaged the ſame premiſes, in fee, to the defendant Mrs. *Gallimore*. *Moſs* continued in poſſeſſion from the date of the leaſe and paid his rent regularly to the mortgagor, all but 28 *l.* which was due before the month of *November* 1778, when the mortgagor became a bankrupt, being at the time indebted to the mortgagee in more than that ſum for intereſt on the mortgage. On the 3d of *January*, 1779, one *Harwar* went to the plaintiff, on behalf of *Gallimore*, ſhewed him the mortgage-deed, and demanded from him the rent then remaining unpaid. This was the firſt demand that *Gallimore* made of the rent. The plaintiff told *Harwar*, that the aſſignees of *Harriſon* had demanded it before, *(viz)* on the 31 of *December*; but, when *Harwar* ſaid, that *Gallimore* would diſtrain for it, if it was not paid, he ſaid he had ſome cattle to ſell, and hoped,

Moſs. *v.* Gallimore. *et al.* Doug. Rep. 266.

hoped ſhe would not diſtrain till they were ſold, when he would pay it. The plaintiff not having paid according to this undertaking, the other defendant, by order of *Gallimore*, entered and diſtrained for the rent, and thereupon gave a written notice of ſuch diſtreſs to the plaintiff in the following words. "Take notice, that I have "this day ſeized and diſtrained &c. by "virtue of an authority &c. for the ſum of "28 *l.* being rent, and arrears of rent due "to *Eſther Gallimore* at *Michaelmas* laſt paſt "for &c; and unleſs you pay the ſaid "rent &c." He accordingly ſold cattle and goods to the amount of 22 *l.* 2 *s.* The queſtion ſtated for the opinion of the court, was, whether, under all the circumſtances, the diſtreſs could be juſtified? And the court determined that it might, ſaying this caſe was, in its conſequences, very material. It was the caſe of lands let for years, and afterwards mortgaged; and conſiderable doubts in ſuch caſes had ariſen in reſpect to the mortgagee, when the tenant colluded with the mortgagor; for, the leaſe protecting the poſſeſſion of ſuch a tenant, he could not be turned out by the mortgagee. Of late years the courts had gone ſo far as to permit the mortgagee to proceed by ejectment, if he had given notice to the tenant that he did not intend to diſturb his poſſeſſion, but only required the rent to be paid to him, and

not

not to the mortgagor. This however was intangled with difficulties. The queſtion here was, whether the mortgagee was, or was not, intitled to the rent in arrear? Before the ſtatute of queen *Ann*, attornment was neceſſary, on the principle of notice to the tenant; but when that took place, it certainly had relation back to the grant, and like other relative acts, they were to be taken together. Thus livery of ſeizin, though made afterwards, related to the time of the feoffment; ſince the ſtatute, the conveyance was complete without the attornment; but there was a proviſion that the tenant ſhould not be prejudiced for any act done by him, as holding under the grantor, till he had received notice of the deed: therefore the payment of rent before ſuch notice was good. With this protection, he was to be conſidered by force of the ſtatute, as having attorned at the execution of the grant. And here the tenant had ſuffered no injury. No rent had been demanded, which had been paid before he knew of the mortgage. He had the rent in queſtion ſtill in his hands, and was bound to pay it according to the legal title. But, having notice from the aſſignees, and alſo from the mortgagee, he dared to prefer the former or kept both parties at arms-length. In the caſe of executions it was uniformly held, that if any one acted after notice, he did it at his peril.

peril. He did not offer to pay one of the parties on receiving an indemnity. As between the aſſignee and the mortgagee, who was intitled to the rent? the aſſignees ſtood *exactly* in the place of the bankrupt; now a mortgagor was not properly tenant at will to the mortgagee, for he was not to pay him rent, he was only ſo *quodam modo*—Nothing was more apt to confound than a ſimile. When a court or a counſel called a mortgagor a tenant at will, it was barely a compariſon. He was like a tenant at will, the mortgagor received the rent by a tacit agreement with the mortgagee, but the mortgagee might put an end to the agreement when he pleaſed. He had the legal title to the rent; and the tenant in the preſent caſe could not be damnified, for the mortgagor could never oblige him to pay over again the rent which had been levied by this diſtreſs. This remedy was a very proper additional advantage to mortgagees to prevent colluſion between the tenant and mortgagor.

Sparkes *v.* Smith *et. al.* 2 Vern. 275.

In the caſe of *Sparkes* v. *Smith*, the court refuſed, on bill, to compel an aſſignee of a term on mortgage to diſcover his aſſignment; the object of the leſſor in requiring it, being to make him liable to the covenants of the mortgagor, although he had not taken actual poſſeſſion of the premiſes.

This

This was a mortgage of houſes held upon leaſe for ſeven years, with covenants that the leſſee ſhould repair, defeazable upon payment of the money lent and intereſt. The houſes being greatly out of repair, the original leſſor filed a bill to diſcover, whether the leaſe was not aſſigned to the mortgagee, and to compel him to perform the covenants on the leſſee's part. The defendant by anſwer inſiſted he never was in poſſeſſion, nor had received any of the rents except a ſmall ſum by an order from the mortgagor to one of the tenants, which was paid him in part of what was due on the mortgage and not as rent. And the court, although it was the mortgagee's folly to take an aſſignment of the whole term, whereby he ſubjected himſelf to the covenants in the original leaſe, inſtead of taking a derivative leaſe of all the term but a month, or week, or day, as he might have done, yet, as he was only a mortgagee, and never in poſſeſſion, would not aſſiſt the plaintiff to charge him to perform the covenants *in ſpecie*; but left the plaintiff to recover at law as well as he could, and diſmiſſed the bill.

But, in a ſubſequent caſe, where one hundred pounds were lent by way of mortgage upon an aſſignment of a building leaſe, and the mortgagee never entered nor took poſſeſſion,

Pilkington *v.* Shaller *et. al.* 2 Vern. 374.

ſeſſion, but loſt the money lent; the defendant in equity having recovered againſt the mortgagee, as aſſignee, the rent reſerved on the leaſe, the bill was to be relieved againſt the recovery at law; and the court diſmiſſed it, ſaying, the mortgagee was ill adviſed to take an aſſignment of the whole term.

Upon an accurate inveſtigation of the reaſons upon which the deciſions in the two preceding caſes were founded, they will appear perfectly reconcileable; in both, *the principle of law, that an aſſignee of a whole term is ſubject to the covenants in the original leaſe*, is fully admitted. The different event of the applications therefore, did not ariſe from a contrariety of opinions as to the legal operation of ſuch an aſſignment, but aroſe from the parties having changed ſides on the applications to the court. In the former caſe the leſſor was plaintiff, and being unable to make out his caſe at law, without the help of equity, applied for it's aid to inforce a rigorous and hard demand, founded in ſtrict law; the court, in this caſe, as it doth in all others, when it is called upon to uſe a diſcretionary power, took into its conſideration the relative ſituation of the parties; and the plaintiff's claim being unconſcionable, elected to remain paſſive, and leave the parties,

as they ſtood at law; but, in the latter caſe, the aſſignee was plaintiff againſt the leſſor; ſo that he, and not the leſſor, ſought the aid of equity, after the latter had obtained a judgment at law upon the covenants; in which caſe, there appears to me to have been no ground for their interference, unleſs fraud or miſtake had been ſuggeſted: for the original leſſor having a right at law to the benefit of the covenants in his leaſe, equity in that caſe muſt follow the law.

And when caſes are attended with hardſhip, leaving the parties to ſuch remedy only as they are intitled to at law, is not uncommon in a court of equity. Thus if a bill be brought by a remote heir againſt the next of kin, for a diſcovery of a title, and evidence, and to have terms removed and the title at law cleared; this being a hard caſe, equity will not aſſiſt; for as it would not relieve the children, ſhould the remote heir recover, ſo neither will it aſſiſt the remote heir.

However, upon reconſideration of this queſtion, in the caſe of *Eaton* againſt *Jacques*, which aroſe upon a caſe reſerved at the ſittings for *Middleſex* before *Buller*, *Juſtice*, it was determined, that a mortgagee, aſſignee of a term for years, ſhould not be liable to the covenants in the leaſe, unleſs he had taken actual poſſeſſion. Eaton v. Jacques. Douglas Rep. 438.

Ibid.

The circumſtances ſet forth in this caſe were; that, on the firſt of *December* 1775, the plaintiff demiſed the premiſes in queſtion to *Denys*; that, on the 21ſt of *June*, 1777, by indenture, made between *Denys* of the one part and the defendant of the other part, after reciting the leaſe, *Denys*, (for the conſiderations therein mentioned,) bargained, ſold, aſſigned, tranſferred and ſet over unto the defendant, his executors, adminiſtrators, and aſſigns, the premiſes demiſed by the leaſe, and all the eſtate, right, title, intereſt, benefit of renewal, term of years, and time to come and unexpired, property, profit, claim and demand whatſoever, of *Denys* in the ſame, by virtue of the leaſe or otherwiſe howſoever, to hold unto the defendant for all the reſidue of the term of twenty one years by the ſaid leaſe demiſed; and ſubject nevertheleſs to the rents and covenants therein contained, and which were on the tenant's part to be paid, kept, and performed: in which indenture was contained a proviſo for making the ſame void on payment of one hundred and fourteen pounds, and intereſt at *five per cent. per annum*; and there was another proviſo and agreement between the parties, that, until default ſhould be made in payment of the one hundred and fourteen pounds and intereſt, contrary to the intent of the ſaid proviſo,

it

it ſhould be lawful for *Denys*, his executors, adminiſtrators, or aſſigns to hold and enjoy the premiſes without interruption from the defendant; that the intereſt which became due on the mortgage was regularly paid up to, and on the 21ſt day of *December*, 1778; and that the defendant never had poſſeſſion of the houſes under the mortgage. The queſtion ſubmitted to the court was, whether the plaintiff was intitled to recover the rent which became due at *Chriſtmas* 1779, from the defendant? And Lord *Mansfield* ſaid, that, in point of fact, this caſe muſt have exiſted for a century paſt in a thouſand inſtances. In this great town particularly, building leaſes had been and were perpetually mortgaging; and yet no inſtance had been found, where the ground landlord had attempted to charge the mortgagee, not in poſſeſſion, with the rent or covenants. This was a ſtrong argument againſt the plaintiff, eſpecially where the caſe was ſo hard, ſo unjuſt, and unconſcionable. Numberleſs inconveniencies would ariſe if ſuch a demand could be ſupported. The mortgagee never aſked whether the rent was paid; he only looked to his ſecurity, and, when the principal and intereſt were paid, he reaſſigned. But, if the plaintiff was right, a mortgagee might be called upon, years after ſuch re-aſſignment, for arrears or breaches of covenant during the aſſignment; the

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conſequences would be terrible: and all this aroſe from a mere ſlip in the attorney in making the conveyance; for, if he had made it an under-leaſe, by leaving a reverſion of a day in the mortgagor, the landlord would have had no pretext to call upon the mortgagee. Though no caſes had been cited at the bar which applied to the preſent queſtion, the court had found two in *Vernon*, which he would ſtate, that it might not be ſuppoſed, after this judgment, they were overlooked. His Lordſhip ſtated the caſes of *Sparkes* v. *Smith* and *Pilkington* v. *Shaller*, and ſaid, the latter could not be ſupported; for, the court there refuſed to relieve the mortgagee, becauſe it was his own fault to take an aſſignment of the whole term, and not an under-leaſe; but that was a very common ground of relief in equity. Theſe caſes, therefore, left the queſtion as it ſtood upon the argument at the bar; and, there being no ſolemn well conſidered deciſion, the court might reſort to the principles. In leaſes, the leſſee, being a party to the original contract, continued always liable notwithſtanding any aſſignment; the aſſignee was only liable with reſpect to his poſſeſſion of the thing. He bore the burthen while he enjoyed the benefit, and no longer: and if the whole was not paſſed, if a day only was reſerved, he was not liable. To

Holford *v.* Hatch. Doug. 174.

Supra. 78, 79.

do

do juſtice between men, it was neceſſary to underſtand things as they really were, and conſtrue inſtruments according to the intent of the parties. What was the effect of this inſtrument between the parties? The leſſor was a ſtranger to it; he ſhould not be injured, but he was not intitled to any benefit under it. Could they ſhut their eyes and ſay it was an abſolute conveyance? It was a mere ſecurity; and it was not, nor ever was meant that poſſeſſion ſhould be taken until default of payment, and the money had been demanded. The legal forfeiture had only accrued ſix months, and, if the mortgagee had wanted poſſeſſion, he could not have entered *viâ facti*. He muſt have brought an ejectment. This was the underſtanding of the parties, and was not contrary to any rule of law. It was not an aſſignment of all the mortgagor's eſtate, right, title, &c. *Willes*, *Aſhhurſt* and *Buller*, *Juſtices*, were of the ſame opinion.

And in a ſubſequent caſe of *Walker* v. *Reeves* *M.* 22. *Geo.* 3. this doctrine was confirmed as to mortgages, and a diſtinction taken between the caſe of an aſſignment *by way of mortgage*, and unconditional aſſignments.

Walker *v.* Reeves. Doug. Rep. 444 (note 1.)

But, if the mortgagee enters into poſſeſſion, he becomes liable to all covenants

Traherne *et al. v.* Sadleir *et al.* 1 Brown's Par. Ca. 105.

that run with the land, for he takes it *cum onere*, and enjoying the profits, he muſt ſubmit to the loſſes.

Although the money be not paid at the day, and the mortgagee brings his ejectment, and enters into poſſeſſion; yet, until after foreclosure, in conſideration of a court of equity and notwithſtanding the form, the mortgagee is conſidered as having but a chattel, and the mortgage is only a ſecurity; the mortgagor is the real owner.

Doug. Rep. 610.

It follows, of courſe, from this view of the tranſaction, that the mortgagee, before foreclosure, cannot exerciſe any act of ownerſhip over the property, which may incumber the mortgagor. He can make no leaſe of the lands for years to an undertenant.

Thus, in the caſe of *Hungerford* v. *Clay*, the bill was for redemption on payment of principal and intereſt. The ſubſtance of the anſwer was, that the defendant the mortgagee, had made a leaſe of the houſe for five years at a rent reſerved, with a covenant, that the leſſee ſhould have the option of a further leaſe for four years after the expiration of the ſaid term; that the term for five years was now expired, and the leſſee deſired to take the premiſes for four

Hungerford v. Clay. 9 Mod. Ca. Eq. 1. 2 Eq. Ca. 610.

years

years longer; that, if the plaintiff would grant ſuch leaſe, the defendant would reconvey on payment of principal and intereſt. On hearing this caſe at the Rolls, the defendant had a decree; but, on appeal to the Chancellor, his Lordſhip was of opinion, that the mortgagee, before foreclоſure of the equity of redemption, could not leaſe the premiſes for years to bind the mortgagor, unleſs, to avoid an apparent loſs, and merely in neceſſity: and the decree at the Rolls was reverſed.

Indeed, if it were otherwiſe, it would be in the power of the mortgagee, effectually, to bar the mortgagor the benefit of redemption at his pleaſure, by granting beneficial leaſes on fines; beſides, if ſuch leaſes were held good, it would be difficult for the mortgagor to recover any rent, though the principal and intereſt ſhould be paid; as, not claiming under the eſtate of the mortgagee, he cannot have any benefit of the leaſe made by him; for, he is neither party to the deed, nor privy to the eſtate.

And, as a mortgagee cannot, before foreclоſure, exerciſe any act of ownerſhip that will attach on the eſtate, but ought to reconvey the premiſes free from all incumbrances; ſo, neither can he juſtify, in equity, the commiſſion of any act

which may injure the eſtate; therefore, though at law, a mortgagee in fee may commit waſte, yet he will be reſtrained in equity.

Hanſon *v.* Derby. 2 Vernon. 392.

Thus, on a bill to redeem a mortgage, wherein an account was decreed, and two hundred and forty pounds reported due, and exceptions taken to the report; it being, on motion and reading affidavits ſhewn, that the defendant had burnt ſome of the wainſcot and committed waſte; the defendant was ordered to deliver up poſſeſſion to the plaintiff, who was a pauper, he giving ſecurity to abide by the event of the account.

Withrington *v.* Banks *et al.* Sel. Ca. in Ch. 30.

So, where the mortgagee of an eſtate in fee had cut down trees, on application to the court, it was decreed; that an account ſhould be taken of what was cut down, and the produce applied in the firſt place to the payment of the intereſt, and then to the ſinking of the mortgage; and an injunction was granted to ſtay felling any more.

Ibid. 31.

But a diſtinction is made where the ſecurity is defective; for, in that caſe, the court will not reſtrain a juſt creditor from his legal privileges; but then, the timber, when cut down, muſt be applied to eaſe the

the eſtate, and not to the mortgagee's benefit.

However, although the mortgagee cannot, to better his ſecurity, do any act to encumber the eſtate mortgaged, which will be valid againſt the mortgagor after redemption, nor will be juſtified in committing waſte; yet, he will be intitled to ſuch expences as he ſhall incur in neceſſary repairs, or other acts for the preſervation of the eſtate mortgaged, and may, certainly, add this to the principal of his debt, and it will carry intereſt. 3 Atk. 518.

Thus if a leaſehold eſtate be mortgaged and there is no covenant on the part of the mortgagor, that he ſhall procure the lives to be filled up, the mortgagee cannot compel him to do it: but muſt pay the expence of renewing, and reimburſe himſelf by adding it to the principal of the mortgage, and it ſhall carry intereſt. So it was determined, in the caſe of *Manlove verſus Ball* and *Bruton*, which was a mortgage of a church leaſe for three lives, two of which died during the time the eſtate was in mortgage, and were renewed on fines paid by the mortgagee. 3 Atk. 4. Lucam *v.* Martins. 1 Wilſon 34. Manlove *v.* Ball. *et al.* 2 Vern. 84. Supra. p. 19.

But, if a mortgagee procures a grant of a new term after the old one be actually expired Rakeſtraw *v.* Brewer Sel. Ca, in Ch, 55.

Lee *v.* Lord Vernon. 7 Brown's Par. Ca. 432.

expired, yet, this will be a truſt for the mortgagor and redeemed with the principal; for it is ſuppoſed to have proceeded from having had the original term: and, although there be nothing in fact in having a tenant-right, yet, as ſuch regard is had to it, in the eſtimation of the world, it will be looked on as the occaſion of the leaſe.

3 Atk. 518.

But the mortgagee is not obliged to lay out money, except to keep the eſtate in neceſſary repair.

Amhurſt *v.* Dawling. 2 Vern. 401. Jory *v.* Cox. Prec. Ch. 71. Attorney General *v.* Scariſbrick *et al.* 2 Vern. 549. Dymoke *et al. v.* Sir John Hobart. 1 Brown's. Parl. Ca. 81.

If a mortgage be made of a manor to which an advowſon is appendant, and a *quare impedit* be brought by the mortgagee to compel the mortgagor to preſent his nominee, the Court of Chancery will grant an injunction to ſtay proceedings thereupon; for the mortgagee can make no profit by preſenting to the church, nor can account for any value in reſpect thereof to ſink or leſſen his debt; the mortgagee therefore, in that caſe, until foreclоſure, is but in the nature of a truſtee for the mortgagor.

Gardiner *v.* Griffith. 2 Will. 404.

A diſtinction was attempted, in the caſe of *Gardiner* v. *Griffith*, between this caſe, and that in which the mortgage was of a long term in a naked advowſon; becauſe,

the

the mortgagee could have no other ſatisfaction than by providing for a child, relation, or friend, on the advowſon becoming void; and the rather, for that it was expreſsly ſo agreed in the mortgage deed; but the court gave no opinion thereupon. And, in the caſe of *Mackenzie* v. *Robinſon*, which was the caſe of a mortgage of a naked advowſon, Lord *Hardwicke* doubted the legality of ſuch a covenant, *that the mortgagee ſhould preſent*, it being a ſtipulation for ſomething more than principal and intereſt; and the mortgagee, not being able to find any precedent in his favour, gave up the point of preſenting; in conſequence whereof, an order was made, that the mortgagor ſhould have liberty to preſent, and the mortgagee was obliged to accept of his nominee.

Mackenzie v. Robinſon. 3 Atk. 560.

In ſuch caſe the mortgagee, inſtead of bringing a bill of foreclоſure, ſhould pray a ſale of the advowſon.

Ibid.

If a mortgage be made under a decree, and directions for a ſale or mortgage with approbation of the maſter; and part of the direction be, that the money, raiſed thereby, ſhould be applied for payment of debts, and a report be made, aſcertaining the debts by ſchedule, the mortgagee muſt

Loyd v. Baldwin. 1 Vez. 173.

ſee to the application of the money; as, if it be miſapplied, he will loſe the benefit of his ſecurity; for, in ſuch caſe, the ſum directed to be raiſed is conſidered as the property of the creditors, and the intereſt, carved out of the eſtate onerated with the charge, is an expreſs truſt for them, that runs with the land from the time of the decree, and cannot be diſcharged but by actual payment, which intitles the perſon advancing the money to ſtand in their place. But, if their debts be not paid, there is no eſtate or intereſt in the land, upon which the mortgagee's demand can attach; that, created by the court, being exactly commenſurate with the extent of the debts upon it, and liable to thoſe charges until they are paid off.

Lloyd *v.* Baldwin. 1 Vez. 173.

So where, after ſuch a decree, the eſtate was mortgaged, and in the deeds there was a recital of the bill and all the proceedings thereon; and the money, inſtead of being applied purſuant thereto, was paid to a truſtee named by the mortgagee, upon truſt, to pay it over to the creditors: it was held that the eſtate in the hands of the mortgagee was liable; for, where there was ſuch a ſpecification or ſchedule, a purchaſer, or mortgagee was bound to ſee the application of the purchaſe money.

And,

And, in ſuch caſe, the creditors will not be obliged to reſort to the truſtee in the firſt inſtance, for the agreement between the parties, cannot change their ſecurity. Ibid.

The law is the ſame if the mortgage be made under the deviſe of an eſtate to be mortgaged, or ſold for payment of ſpecific debts in a ſchedule. Ibid. Spalding *v.* Shalmer *et al.* 1 Vern. 303.

In ſuch caſes the mortgagee ought not to pay the money to the truſtees, but ſhould ſee to the application, and take aſſignments from the creditors. 1 Vez. 173.

So, if money be advanced by a mortgagee under an act of parliament, the mortgagee muſt ſee to the application of it. Sir John Cotterel *et al. v.* Hampſon *et al.* 2 Vern. 5.

But, it is an eſtabliſhed doctrine that, upon a truſt or deviſe for the payment of debts in general, without a ſpecification of the debts in a ſchedule, a purchaſer would be indemnified, although he ſhould not ſee to the application of the money; which is a determination in ſupport of ſuch truſt, and to render the ſale of ſuch eſtate more eaſy. Lloyd *v.* Baldwin. 1 Vez. 173.

Though where lands are appointed or conveyed to pay debts, the heir is intitled to have them after the debts paid, yet a purchaſer is not concerned, whether there Culpepper *v.* Aſton. 2 Ch. Ca. 115. 223.

be

be ſufficiency or not, to pay this out of the perſonal eſtate; for, if he advance his money on the lands, he ſhall hold them againſt the heir, notwithſtanding there be perſonal aſſets, and the heir muſt take his remedy againſt the truſtee; and ſo, if the matters reſt in account between the heir and truſtee, his purchaſe is ſafe, though the money be miſapplied by the truſtee.

Culpepper *v.* Aſton. 2 Ch. Ca. 223.

But if the lands be not to be ſold if the debts can be raiſed out of the perſonal aſſets, and the rents and profits of the lands; the purchaſor acts at his own peril, if the perſonal eſtate and profits of the land received were ſufficient, and afterwards become inſufficient.

Ibid.

And in the former caſe, if the heir (who is intitled to the lands, after ſufficient is raiſed, by a truſt implied and reſulting on conſtruction of the truſt in the inſtrument, though not expreſſed) doth attach his claim by exhibiting his bill, then, no one can ſafely purchaſe after the bill, *lite pendente*; for, when exhibited againſt the truſtee, it will bind him and all claiming under him, *pendente lite*.

Sir John Talbot *et. al. v.* Duke of Shrewſbury. Gilb. Eq. Ca. 89. Sc. Preo. Ch. 394.

When lands are ſettled and deviſed in order to raiſe money *out of the rents and profits* of ſuch lands, for the payment of portions *at certain and prefixed days*, or for the payment of debts; there, though there

there be no clauſe impowering the truſtees to diſpoſe of the land for thoſe purpoſes by ſale or mortgage, yet, if the portions cannot be raiſed out of the rents and profits, ſo as to be paid at the times appointed, or if the rents and profits do not anſwer the payment of the debts within a reaſonable and convenient time, the truſtees may mortgage the lands in order to fulfil the truſt: becauſe it is the deſign of the truſt, that the debts and portions ſhould be ſatisfied out of the lands; and, if they cannot be ſatisfied by the perception of the annual profits, they muſt be ſatisfied by the profits of the fee ſimple. This muſt be made appear by an account taken, of the debts and portions to be ſatisfied out of the eſtate, and likewiſe of the annual profits of ſuch eſtate.

Backhouſe *v.* Middleton *et. al.* 1 Ch. Ca. 173. Sheldon *et. al. v.* Dormer. 2 Vern. 310.

But, if ſuch payments be to be made out of the annual profits or rents *only*, then, it ſeems, the payments muſt be made as they can, without ſale or mortgage; becauſe the court cannot enlarge the diſpoſitions that perſons make of their eſtates, farther than the intent of ſuch conveyances. So likewiſe, if the payment be deviſed to be made out of the rents *only*, the lands cannot be ſold by the truſtees, becauſe they are confined to the yearly income thereof.

Sir John Talbot *v.* Duke of Shrewſbury. Gilb. Rep. Eq. 89.

Chapman *v.* Emery. Cooper. Rep. 278.

A mortgagee hath been determined to be a purchaſer within the 27th *Eliz. c.* 4.

Plowd. 373. Cruiſe on fines 233.

A fine and non-claim by a mortgagee in poſſeſſion, will not bar the equity of redemption.

Piddock *v.* Brown. 3 Will. 289.

Producing a bond or mortgage, is, *primâ facie*, good evidence of a debt; but, it ſhould ſeem, it would not avail if there were manifeſt ſigns of fraud in the obligee or mortgagee; for, in ſuch caſe, he ought to be put to the proof of actual payment; and though he may happen thereby to loſe ſome part of the money really due to him for want of proof, this is but a juſt puniſhment for the fraud which it is evident he meant to be guilty of, and would be a proper diſcouragement to others from committing the like.

By the 9 *Ann. c.* 5. which requires, that Knights of the Shire ſhould have 600*l. per annum*, and every other member 300*l. per annum*; it is enacted "That no perſon ſhall be qualified to ſit in the houſe of commons within the meaning of the act, by virtue of any mortgage, whereof the equity of redemption is in any other perſon; *unleſs* the mortgagee ſhall have been in poſſeſſion of the mortgaged premiſes for ſeven years before the time of his election."

CAP.

CAP. V.

Of the Equity of Redemption and who may claim it.

AS the mortgagor may, at any reaſonable time, call upon the mortgagee to redeem, ſo likewiſe may any other perſon, claiming an intereſt under him.

And therefore, where a man made a voluntary deed, and afterwards mortgaged the ſame lands, and the *firſt deed*, on trial at law, was found fraudulent againſt the mortgagee; yet, on a bill exhibited by the perſon to whom the deed was made to redeem the mortgage, it was held that, though the firſt deed was fraudulent, becauſe voluntary, as to the mortgage, yet, it was good as to the equity of redemption, and would paſs that; for a voluntary deed would bind the party that made it, and his heirs.

Rand. *v.* Cartwright. 1 Ch. Ca. 59. 1 Vern. 193. E. Ca. Abr. 315. 1. Barthrop. *v.* Weſt. 2 Rep. Ch. 62.

Aſſignees of a bankrupt may redeem, or aſſign an equity of redemption.

1 Ch. Ca. 71.

Dougl. Rep. 22. Keech *v.* Hall. Supra. 63.

So likewiſe a tenant may put himſelf in the place of the mortgagor, and either redeem himſelf, or get a friend to do it.

Howard *v.* Harris. Supra. 18.

The aſſignee in equity may redeem a mortgage.

Jones *v.* Meredith. *et. al.* Bunb. 346. Comyns Rep. 661.

A mortgage by a popiſh heir may be redeemed by the next proteſtant heir.

2 Vez. 304.

An equity of redemption will follow the cuſtom as to the legal eſtate. In borough engliſh lands, if mortgaged, the equity of redemption will deſcend to the youngſt ſon to whom the lands deſcend.

Ibid.

So, in mortgages of gavelkind lands which deſcend to all the children equally, the equity of redemption deſcends to all likewiſe.

Philips *v.* Hele. 1 Ch. Rep. 190. *et. vid.* 2 Burr. 978.

And it may be deviſed. Thus, where one, ſeized in fee ſimple, mortgaged his lands with a proviſo for repayment by him, his heirs, or aſſigns, and then deviſed the ſame premiſes; the court decreed, on a bill by the deviſee to redeem, that the equity of redemption belonged to him and not to the heir.

Shirley. *v.* Watts. 3 Atk. Rep. 200.

So, a judgment creditor may redeem againſt a mortgagee of a leaſehold eſtate,

who is likewiſe a bond creditor: but, before the bill is brought to redeem, *a writ of execution* muſt be ſued out; for, until that be done, the judgment creditor hath no *lien* on the leaſehold eſtate, and, for want of it's being taken out, the bill in the principal caſe was diſmiſſed.

Angel *v.* Draper. 1 Vern. 399.

King *v.* Mariſſal cited in the principal caſe.

Tenant by elegit, ſtatute merchant, or ſtaple may redeem.

Bunb. 347. 2 E. C. Abr. 594. notes.

The crown may redeem eſtates mortgaged, forfeited by the mortgagor by being indicted and outlawed for high treaſon.

Attorney General *v.* Crofts *et. al.* 1 Brown's Par. Ca. 222.

A jointreſs may redeem, and although the jointure be ſecured only on part of the eſtate, yet, ſhe may redeem the whole; ſo ſhe may, though part of it be ſettled on her after marriage; and, if ſhe pays more than a third part of the principal money, ſhe ſhall hold the lands until reimburſed.

Howard *v.* Harris. Supra. page. 18. Ch. Ca. 271. Palmer *v.* Danby E. Ca. Abr. 219. S. 6. Haymer *v.* Haymer. 2 Vent. 343.

And an huſband may be tenant by the curteſy of an equity of redemption.

2 Cha. Ca. 99, 100. Pre. Ch. 237. infra.

Thus, where the father of the plaintiffs deviſed to *Anne* his daughter, the plaintiffs eldeſt ſiſter, all his eſtate freehold and copyhold in fee, charged with 200 *l.* a-peice to the plaintiffs: *Anne*, after her father's death, poſſeſſed the ſeveral eſtates, and married

Caſborne *v.* Scarfe Inglis. 1 Atk. 603.

with the defendant *Inglis*. Soon after *ſhe* died leaving *iſſue a ſon* who died an infant and without iſſue; upon his death the plaintiffs, being heirs at law both to the infant and their ſiſter, became intitled to the real eſtate. *Anne Inglis*, before her marriage, mortgaged part of the freehold premiſes to the defendant *Scarfe* for 900 *l.*: the bill was brought againſt the mortgagee and the huſband for an account, and for the direction of the court.

The defendant, the huſband, inſiſted that, having had iſſue by his wife, he was intitled to an eſtate for life in his late wife's freehold premiſes as tenant by the curteſy, ſubject to the mortgage of the defendant; and the Maſter of the Rolls, on hearing the cauſe, was of opinion the defendant *Inglis* was not intitled to a tenancy by the curteſy in the eſtate, comprized in the mortgage, and decreed accordingly. But this decree was reverſed on appeal to Lord Chancellor *Hardwicke*, who, in giving judgment on this point, ſaid that the queſtion depended on two conſiderations; firſt, on what ſort of intereſt an equity of redemption was conſidered to be in that court: ſecondly, on what was neceſſary to intitle a man to be tenant by the curteſy. Firſt, an equity of redemption had always been conſidered as an eſtate in the land, for it might be deviſed, granted,

granted, or entailed with remainders; and ſuch entail and remainders might be barred by fine and recovery: and therefore it could not be conſidered as a mere right only, but muſt be taken to be ſuch an eſtate whereof there might be a ſeizin. That, the perſon therefore intitled to the equity of redemption was conſidered as the owner of the land, and a mortgage in fee was taken to be perſonal aſſets. That, by a deviſe of all lands, tenements and hereditaments, a mortgage in fee would not paſs, unleſs the equity of redemption were foreclоſed; and, that, if after ſuch deviſe made, a foreclоſure was had, yet, ſuch eſtate would not paſs by thoſe general words, of lands, tenements and hereditaments; becauſe a foreclоſure was conſidered as a new purchaſe of the lands. That, the intereſt of the land muſt be ſomewhere, and could not be in abeyance; but it was not in the mortgagee, and therefore muſt be in the mortgagor. That, it was certain the mortgagee was not barely a truſtee to the mortgagor, but to ſome purpoſes, namely; with regard to the inheritance he certainly *was*, until a foreclоſure. Secondly, at common law, four things were neceſſary to intitle the huſband to be tenant by curteſy, *viz*; marriage, iſſue, death, and ſeizin in fact. In this caſe the three firſt concurred, but it was objected that here was no ſeizin whatever of the legal

eſtate in the wife in the conſideration of law. However that was not the preſent queſtion; the true queſtion was, whether there was ſuch ſeizin or poſſeſſion of the equitable eſtate in the wife, as, in *that court*, was conſidered as equivalent to an actual ſeizin of a freehold eſtate at common law? And his Lordſhip was of opinion that there was. *Actual* poſſeſſion cloathed with the receipt of the rents and profits was the higheſt inſtance of an equitable ſeizin, both of which there was in this caſe; and, that a huſband ſhould be tenant of the curteſy of the equitable eſtate of the wife had been often determined. It was ſo held in *Sweetapple* v. *Bindon*, which was a much ſtronger caſe than this; for, in that caſe, there was neither ſeizin nor land: and, in 2 *Vern.* 680. it was held that lands, articled for only, would paſs by a will.

Sweetapple v. Bindon. 2 Vern. 536.

His Lordſhip ſaid the principal objections to the huſband's claim were two: firſt, laches and neglect in the huſband by not paying off the mortgage. Secondly, that the rule ought to be equal between dower and curteſy, and that dower could not be of a truſt-eſtate.

Vid. infra.

As to the firſt, it was not ſimilar to the caſes of laches in the huſband, *viz.* as in a caſe where entry was requiſite; becauſe it

it was nothing near ſo eaſy to pay off a mortgage as to make an entry: and it held equally ſtrong in the caſe of a truſt-eſtate; for a huſband might more eaſily get a decree for his truſtees to convey than a decree to redeem a mortgage, which was neceſſarily attended with many delays.

The ſecond objection proved too much, if any thing, and intirely failed by the precedents of that court: if any innovation were to be made, his Lordſhip was of opinion that the neareſt way to right would be to let in the wife, to dower of a truſt-eſtate, and not to exclude the huſband from being tenant by the curteſy of it. There could be no inconvenience to the heir at law, for he would have the ſame remedy in this court, to make a tenant by the curteſy keep down the intereſt, as againſt any other tenant for life. For theſe reaſons his Lordſhip was of opinion that the defendant was intitled to be tenant by the curteſy, and the decree at the Rolls, as to this part, muſt be reverſed.

A ſubſequent incumbrancer may redeem the former. Therefore, where there was a mortgage, and the mortgagor afterwards acknowledged three judgments to other perſons for other money due, two of the perſons to whom the judgments were given, (to the intent

Greſwold *v.* Marſham. 2 Ca. Ch. 170. Criſp. *v.* Heath. 7 Vin. Abr. 52. pl. 2.

intent that, the mortgage being ſet aſide, they might take out execution on their judgments,) gave notice to the mortgagee thereof, and requeſted him to accept of his money, which, they ſaid, they were ready to pay him; and deſired him to appoint a time when, and they would pay him within a fortnight. It was in proof that no money was actually tendered: afterwards, the mortgagee, exhibited a bill and had a decree to foreclose, and then, took a further abſolute conveyance from the mortgagor for a conſiderable ſum of money. The two creditors, on a bill exhibited, had a decree againſt the mortgagee to pay them their money, but, the third creditor had no relief, becauſe he did not give notice in time of his judgment.

Morret *et. al.* *v.* Weſterne. 2 Vern. 663.

But where the defendant, after ten years ſuit, four ſeveral reports, and two trials at law, obtained a decree to foreclose upon a mortgage; and the plaintiffs had judgments and other incumbrances on the eſtate ſubſequent to the defendant's mortgage, and the bill was brought by the plaintiffs for an account of profits, and to redeem; the defendants pleaded all the former proceedings, the taking the account in an adverſary way, report, references, trials at law and the decree ſigned and inrolled, in bar of any new account to be taken, and denied notice

notice of the plaintiffs incumbrances; but the plea was over-ruled.

There is a clear diſtinction between the preceding and the laſt caſe; in the former an actual purchaſe was compleated and covered by the mortgage, which could not be impeached but by a creditor of whom the purchaſor had notice; in the latter there was only a decree for a foreclosure, which did not affect the judgment creditors as to their right of redemption.

Redemption of a mortgage may be had againſt the King.

Pawlett. *v.* Attorney General Hard. 465.

A mortgagor may redeem, *even* after a releaſe of the equity of redemption, if it appear, by circumſtantial proofs, that it was made upon a ſecret truſt and for his benefit.

Thus in the caſe of *Morely* againſt *Elways*, where the plaintiff and his father, in *December* 1641, made a mortgage to the father of the defendants; the plaintiff's ſuit was to have redemption. The defendants ſet up a releaſe made by the plaintiff in 1646, of all his equity of redemption, and a decree made by the Lord Chancellor *Hide* in this cauſe, in 1663, which decree was penned as if made by conſent. This decree being ſigned and inrolled, and the plaintiff not being able to perform the ſame, he could not have a bill of review, nor could

Moreley. *v.* Elways *et. al.* 1 Ch. Ca. 107. Trin. 1668.

could he have been relieved by ſuch bill, if it had been brought, the releaſe barring all his pretenſions; and that being upon a ſecret truſt, he could not prove the truſt poſitively, the witneſſes being dead; wherefore he was not relievable either in law or equity. The plaintiff petitioned the Houſe of Lords for relief againſt the decree and releaſe. The proofs offered to evidence the truſt were circumſtantial, and not direct poſitive proofs. They went principally to ſhew, that the debts, due from the plaintiff and his father, were ſmall in compariſon with the value of the eſtate at the time of making the releaſe. Theſe proofs being read, and it appearing clearly thereby, that the value of the lands was much greater than to make a ſatisfaction, for the debt for which it was releaſed, it was determined to be a truſt; and the cauſe was referred back to the court to be proceeded upon, as in the caſe of an equitable mortgage, which their Lordſhips adjudged it to be. Afterwards the cauſe was reheard in court, when a decree was made for the defendants to come to an account, and the plaintiff to be admitted to the redemption of his eſtate.

And if there be tenant for life, with remainder or reverſion in fee of an equity of redemption, they ſhall contribute proportionably what is due on the mortgage.

So,

So, a deviſee of an eſtate for life in an equity of redemption may redeem and hold over, until thoſe in remainder contribute.

And in ſuch caſe the general rule is, that the eſtate of the tenant for life in the premiſes ſhall be rated at one third, and that of the remainder-man or reverſioner in fee at two thirds of what is due for principal and intereſt.

Rowell. *v.* Walley. 1 Rep. Ch. 221. Ballett. *v.* Spranger. Prec. Ch. 62.

And if the mortgage money is payable on a contingency not arrived, he in remainder or reverſion may exhibit, his bill *quia timet*, againſt the tenant for life, and the tenant for life ſhall be decreed to contribute.

Hayes *v.* Hayes. 1 Ch. Ca. 223

And if the tenant for life of the equity of redemption pays off the mortgage, and has the term aſſigned over in truſt for himſelf, and makes improvements, and dies; and afterwards the remainder-man or reverſioner comes to redeem; his repreſentatives ſhall have the allowance of two thirds of the laſting improvements, but nothing for the other third, becauſe he received the benefit thereof during his life; and no intereſt ſhall be allowed during the life of tenant for liſe for the money he paid, for he is bound to keep down the intereſt during his eſtate.

Newling, *v.* Abbot. Eaſter. 1 Geo. Vin. Abr. 185. Ca. 8, letter. a. Sc. 2 Eq. Ca. Abr. 596, 14.

Clyat. *v.* Batteſon. 1 Vern. 404.

A diſtinction is made in computing the value of the life, where the application is during the life of tenant for life, and where after his death. For where lands in mortgage were deviſed to *A.* for life, remainder to *B.* and his heirs; *A*, entered, bought in the mortgage, took an aſſignment in truſtees names, and died. *B.* the remainder-man, preferred his bill againſt the defendant, the repreſentative of *A*, to redeem. It was inſiſted, by *B*'s counſel, that he ought to pay but two thirds of what was due on the mortgage, and that the other third ought to be allowed by the defendant, by reaſon the tenant for life enjoyed the profits during his life. But the court ſaid, had the application for redemption been in the life-time of the tenant for life, then, that he ſhould have been allowed a proportion of the money, in proportion to the value of the reſpective eſtates of the tenant for life and the remainder-man; but, he being now dead and having enjoyed the eſtate but one year only, the defendant muſt make an allowance *only* for the time that *A.* enjoyed the eſtate.

James *v.* Hailes. Prec. Ch. 44.

In the caſe of *James* and *Hailes*, it is laid down that, if an eſtate in mortgage be ſettled on *A*, for life, and then on *B*, in tail or in fee, the tenant for life ſhall bear two fifths

fifths of the principal and intereſt, and the remainder-man three fifths.

But where he, who is poſſeſſed of the equity of redemption, hath ſuch an intereſt in the eſtate, as he can *ſecure* the money laid out by him to redeem upon; the remainder-man ſhall pay him, or his repreſentatives *all* he hath advanced.

As where a *tenant in tail* of a mortgaged eſtate, under the will of his father upon the death of his two brothers, paid off a debt originally on the eſtate by mortgage term for years, but neglected to have an aſſignment of the term to himſelf, and afterwards deviſed the ſame lands; and the plaintiffs, the remainder-men under the will, claimed the eſtate, as not barred, diſcharged of the incumbrance. The Lord Chancellor held that, there being a term for years in the mortgagee which ſtood in point of law as it did before, no aſſignment in law being made thereof, none of the parties before the court had the legal eſtate, for a conveyance of which the plaintiffs came; and therefore *that* conveyance muſt be upon equitable grounds. That, ſo far as it appeared, tenant in tail paid it off with his own money; that he might have taken an aſſignment of the term, either, in truſt, to attend the inheritance which would have ended

Kirkham *v.* Smith; 1 Vez. 258.

ended this queſtion, or, in truſt for himſelf, his executors or adminiſtrators, which would, notwithſtanding the remainder over, have kept this incumbrance on foot for the benefit of his perſonal eſtate and thoſe intitled thereto; or, that he might have called for an aſſignment of it in his life, if he had found out this limitation in remainder, that it might have been made for the benefit of his executors *not* of the remainder; but his not doing any of theſe, clearly proved that he took himſelf to have had the abſolute ownerſhip and diſpoſal of it. And the court could not decree to perſons, claiming this in contradiction to his apprehenſion and intent, a conveyance of the inheritance, and likewiſe of this term, without making a ſatisfaction to the perſonal eſtate of the tenant in tail; as that would be contrary to the maxim that, *he who would have equity muſt do equity*; and the plaintiffs were decreed to have the eſtate, ſubject to the money paid by the tenant in tail in diſcharge of the mortgage.

Sawley *v.* Gower. 2 Vern. 61. Placknet *v.* Kirk. 1 Vern. 411. 2 Atk. 294.

An equity of redemption of a mortgage in fee is not aſſets at law, becauſe the eſtate is forfeited; and if a ſpecialty creditor bring an action againſt the heir, the heir may plead *riens per diſcent*; but the heir having a right in equity, *that* is *in equity liable*

ble to ſatisfy debts; and if the heir aliens, or releaſes his equity of redemption, to prevent the creditors from having a ſatisfaction for their debts, the Court of Chancery will follow the money in the hands of the heir or executor.

Cont. Bennet *v.* Box. cited 1 Vern. 410. *Query* if before the ſtatute of fraudulent deviſes.

Thus where *C.* made a mortgage and died poſſeſſed of the equity of redemption of a *term for years*, leaving greater debts than his eſtate would pay; a queſtion aroſe in Chancery, whether this mere equity of redemption was only equitable aſſets and diſtributable equally, *pro rata*, among all the creditors, without regard to the degree or quality of their debts; or, whether it ſhould be applied in a courſe of adminiſtration, in which caſe, the bond creditors would ſwallow up all the aſſets without leaving any thing for the creditors upon ſimple contract? And it was ſolemnly determined that this equity of redemption was equitable aſſets only; for, the mortgage being of the *whole* term and forfeited at law, and the right of redemption being *barely* an equitable intereſt, it was reaſonable to conſtrue it equitable aſſets, and conſequently diſtributable amongſt all the creditors, *pro rata*, without having reſpect to the degree or quality of the debts; all debts being, in a conſcientious regard, equal, and *equality the higheſt equity*.

Creditors of Sir Charles Cox. 3 Will. Rep. 341.

But,

Cole *v.* Warden. 1 Vern. 410. Maſſam *v.* Harding. Exchequer 1734. Spencer *v.* Biffin at Rolls Michaelmas Term 1734. 1 Salk. 354.

But, if lands in fee be mortgaged for a term of years, the reverſion in the mortgagor, expectant upon the determination of the term for years, will be *aſſets at* law liable to debts, and attract the redemption. In ſuch caſe, although the mortgage be for a thouſand years, yet, the bond creditor may have judgment againſt the heir of the obligor, and a *ceſſet executio*, until the reverſion come into poſſeſſion.

Fortrey *v.* Fortrey. 2 Vern. 134.

But the judgment will be of aſſets *quando acciderint*, and the creditor cannot, by a bill in equity, compel the heir to ſell the reverſion, but muſt expect until it falls.

Sawley *v.* Gower. 2 Vern. 61.

Where creditors are plaintiffs, the uſual claim is that the debts ſhall be paid in the courſe of adminiſtration; but that is to be intended of legal aſſets, and not of aſſets in equity that are not aſſets at law.

Hard. 469. Turner *v.* Gwinn. 1 Vern. 41.

An equity of redemption is deviſeable for payment of debts.

Child. *v.* Stephens.

But if an equity of redemption be deviſed for payment of debts, a diſtinction is taken in the application of the aſſets, where lands mortgaged are deviſed for payment of debts generally; and when the deviſee for paymen of debts is made executor. In the former caſe it will be taken to be equitable

aſſets

assets and all the creditors are equally concerned and intitled, and none are to be preferred before the other. Statutes, judgments, bonds, or simple contract debts, if they do not *attach* upon the very land so devised, (as a judgment cannot, if the land be in mortgage at the time of giving it,) shall be paid in proportion, and by average; and so of other equitable incumbrances. But, in the latter case, the equity of redemption in the executor will be legal assets, and he must pay debts on specialties before debts on promises: the former having an artificial preference at law, though naturally and in conscience, a debt by contract without specialty is as justly due as the other.

1 Vern. 101. 2 Ch. Ca. 54. Hixon *v.* Wytham. 1 Ch. Ca. 248, 9.

Thus where *A*, having made a settlement on lands which he covenanted were of a certain annual value, mortgaged all his other lands, and then confessed a judgment defeazanced on payment of a sum certain. Afterwards *A*, made his will, and devised *all* his lands for payment of his debts, *and constituted, the devisee in trust for payment of debts, executor.* A bill was filed by the judgment creditor to have the trust performed and his debt satisfied. The defendant's answer admitted the devise for payment of debts, but set forth the jointure, covenant, and the mortgage, and that the

Girling *v.* Lee 1 Vern. 63. Hixine *v.* Mortley cited in Girling *v.* Lee.

lands jointured were not of the value for which they were given. The queſtion was, whether the debt upon covenant and that upon judgment ſhould be paid *pari paſſu*, or, whether the latter ſhould be firſt diſcharged? And it was decreed that the lands ſhould be ſold for payment of debts, according to the truſt in the defendant's father's will, and that the plaintiffs ſhould be let in for a ſatisfaction of his judgment, without regard had to the covenant for making good the jointure. The ground of which determination I apprehend to have been that, where the deviſee in truſt is likewiſe made executor, equity *infers* that the teſtator meant to deviſe his eſtates as perſonalty, and of conſequence the aſſets are conſidered as legal; but that inference is not neceſſarily called for in a deviſe to truſtees, there being no ground to imagine that the teſtator intends in that caſe to alter the nature of his property, but only means to make it liable to his debts, and the court will not otherwiſe imply it; the conſtruction, which makes the aſſets equitable, being more conſonant to ſubſtantial juſtice in caſe of a deficiency to pay all debts.

And this reaſoning ſeems to me to be ſupported by the reſolution of the court, where lands mortgaged were deviſed in truſt

for

for payment of debts though the deviſee was made executor, *the deviſe being made to him and his heirs*; for, in that caſe, the aſſets were held to be equitable.

In the caſe I allude to, *A*, deviſed, *inter alia*, as follows. My nephew I make ſole executor, and *to him and his heirs* I give and deviſe all my meſſuages, lands, tenements, and hereditaments, upon truſt to ſell the ſame, and with the monies, to be raiſed by ſale and my perſonal eſtate, to pay my debts and portions to my children. The queſtion was, whether the money raiſed by ſale ſhould be legal aſſets? and it was reſolved that, the deviſe being to the executor and his heirs, the lands muſt go in a courſe of deſcent, and he muſt take as a truſtee, and not as an executor; and the court decreed the debts and portions to be paid in proportion.

Anonymous 2 Vern. 133.

On ſuch a deviſe of lands to the *executor*, creditors ſhall be paid before legatees, and not *only* in proportion; but, it ſhould ſeem, that if the lands be given to truſtees and they be not conſtituted executors, debts and legacies, except thoſe affecting the land, muſt be paid in proportion. Becauſe the will of the owner makes the land liable, and that gives no preference expreſsly or impliedly to one before the other.

Hixon *v.* Wytham 1 Ch. Ca. 248. Supra. 1 Mod. Rep. 117. Whitton *v.* Lloyd. 1 Ch. Ca. 275.

Where lands mortgaged are deviſed to a truſtee for payment of mortgages and ſpecific legacies, though the *remainder* be given to him in fee, yet, if the *truſtee* be made *executor*, the equity of redemption is conſidered as legal aſſets in his hands; the reaſon ſeems to be, becauſe, as to the deviſe for payment of debts, it falls upon him as executor and not as deviſee of the inheritance; and thus this caſe is diſtinguiſhable from that in 2 *Vernon* 133.

Supra. 115.

Brunt *v.* Beſt. *et al.* 1 Vern. 69.

Thus, where *A*, having mortgaged copyhold lands, afterwards ſurrendered them to the uſe of his will, and then deviſed them to *B*, in truſt in the firſt place, to pay off and diſcharge the mortgages on the ſaid lands; and, in the next place, to pay ſeveral legacies, particularly a legacy of 200 *l.* to the plaintiff's wife, *the remainder in fee to B*, and made *B*, *his executor*. *B*, proved the will, and paid debts not on mortgage; and to raiſe money for that purpoſe, made ſeveral new mortgages of the lands in queſtion. The plaintiff exhibited his bill for ſatisfaction of his wife's legacy and to redeem; inſiſting that, after the mortgages made by *A*, were diſcharged, the lands ſhould ſtand charged with his legacy, and that it ſhould not be poſtponed to the new mortgages made by *B*. But it was reſolved that the plaintiff could not be admitted

mitted to redeem part without redeeming the whole; for *B*, was not *only a truſtee* for payment of debts, but alſo, *executor* to the deviſee; that the lands, in his hands, *were legal aſſets* charged with *all* the debts of the teſtator, and, by conſequence, with the new mortgages made by *B*; the money having been raiſed by him for payment of the debts of the teſtator.

If a mortgage be made of lands, and afterwards more money is raiſed by ſubſequent mortgages; and then the mortgagor, by deed in his life-time and by will, conveys and ſettles all his lands *unto truſtees* for payment of his debts, by which they become equitable aſſets, the ſubſequent mortgagees, having a ſecurity for their money by a lien upon the eſtate, which the court will not take from them, and, in preſervation of their own intereſt a right to redeem, ſhall be firſt ſatisfied; although the eſtate in queſtion was in the firſt mortgagees and the ſubſequent mortgagees had only an equity.

Child *v.* Stephens, 1 Vern. 101.

But, if a deviſe be of the equity of redemption of a *truſt-eſtate* by the *ceſtui que truſt*, ſubject to the payment of his debts; notwithſtanding *the deviſee be heir at law*, yet the equity of redemption ſhall be equitable aſſets.

Pluncket *v.* Penſon. 2 Atk. 290,

Thus where *Penſon* the teſtator, who was the *ceſtui que truſt* of a real eſtate, made a mortgage of it in fee; and, the equity of redemption being in him, he, by his will, gave and deviſed to his dear ſon and to his heirs for ever the mortgaged premiſes, ſubject nevertheleſs to the payment of his debts, annuities, and legacies, and then died indebted by bond and ſimple contract; one queſtion was, whether an equity of redemption of a mortgage in fee of a truſt-eſtate ought to be conſidered as legal or equitable aſſets? Lord *Hardwicke*, in giving judgment on this caſe, admitted that, if a mere truſt-eſtate *deſcended upon an heir at law*, it would be conſidered as legal and not as equitable aſſets; which was founded upon the third clauſe of the ſtatute againſt fraudulent deviſes that gave a ſpecialty creditor his remedy at law by an action of debt againſt the heir of the obligors. But his Lordſhip ſaid, that the ſtatute had not made a mortgage in fee of a truſt-eſtate ſubject to the ſame thing; that if the plaintiff was under the neceſſity of coming to Chancery for relief, the court would act according to it's known rules of doing equal juſtice to all creditors without any diſtinction as to priority. And the real eſtates were ordered to be ſold, and that, after paying off the mortgages, the creditors ſhould be paid what was left *pari paſſu*.

An

An equity of redemption has never been held to be liable to a bond creditor in the life of the mortgagor. 2 Atk. 292.

In the caſe of *Penville* v. *Luſcomb* at the Rolls the 4th. of *February* 1728, Sir *Joſeph Jekyl* was ſtrongly inclined to think there could be no *poſſeſſio fratris* of an equity of redemption. *Sed quære*, for, in arguing the ſame caſe, Mr. *Fazakerley* ſaid he had a note of a caſe with the ſame names determined by Lord *Cowper* in 1716, wherein his Lordſhip held directly the contrary; namely, that there might be a *poſſeſſio fratris* of an equity of redemption. And the latter opinion ſeems to me to be moſt reaſonable; for, there may be a *poſſeſſio fratris* of an uſe, and yet, in law, an uſe was neither aſſets in the executor nor in the heir, as an equity of redemption is; beſides, the mortgagee, before foreclоſure, is, as to the inheritance, a truſtee for the mortgagor, and a truſt-eſtate, now, is analogous to an uſe at common law.

Cited. 1 Atk. 604. *Cont.* ibid.

Co. Litt. 146.

1 Co. 124. b. Plow 58.

1 Atk. 606.

In general, no perſon will be allowed to come into equity for a redemption, but he that hath the legal eſtate.

Bickleys *v.* Dorrington. Monk *v.* Pomfret.

Quæ. where 2 E. Ca. 605. 39 Barnard. Rep 30.

Thus, where the plaintiff, claiming under the heir general, came to redeem a mortgage, and the defendant, by anſwer, ſet

Lomax *v.* Bird. 1 Vern. 182.

forth a deed of intail intitling another perſon to the equity of redemption; the plaintiff prayed he might redeem at his peril, but the Lord Keeper would not permit him to do it, unleſs he could make out that the eſtate-tail was docked.

But if third perſons be intereſted in the equity of redemption, and he or they who are in law intitled to the eſtate refuſe to redeem, or ſhould act colluſively; any perſon intereſted will be permitted to redeem.

Franklyn *v.* Fern. Barnard. Rep. 30.

Thus, where one mortgaged his leaſehold eſtate and afterwards became a bankrupt, a commiſſion iſſued, and a meeting was had by the creditors to conſider whether the aſſignees ſhould bring a bill to redeem. The majority of the creditors were of opinion, that it was not adviſeable ſo to do. In conſequence of this opinion the aſſignees could not do it, by an expreſs clauſe in the ſtatute of the 5th *Geo.* 2. relating to bankrupts. The reſt of the creditors thought it was adviſeable to file a bill for redemption, and thereupon brought a bill in their own names againſt the mortgagee and the aſſignees, praying to be let in to the redemption of the leaſe. The aſſignees, by their anſwer, took part with the plaintiffs. One queſtion was, whether the creditors of a bankrupt had a right, in this caſe,

caſe, to bring their bill againſt the mortgagee to compel him to redeem, making the aſſignees of the bankrupt defendants? Mr. *Juſtice Parker*, who ſat for the Chancellor, was of opinion they had. He ſaid that it was very true that, in general, no perſon ſhould come into equity to redeem, but who was intitled to the legal eſtate of the mortgagor. So, if an executor were willing to get in the debts of the teſtator, there was no foundation for a creditor to bring his bill for that purpoſe. That in general, where there were proper perſons to get in the eſtate of another, a court of equity would not ſuffer either the creditors of the teſtator or the creditors of a bankrupt to bring a bill in equity in order to get in that eſtate. But, that if an executor or aſſignees under a commiſſion colluded with a debtor, there was no doubt but a creditor might bring his bill in order to take care of the eſtate, and charge the aſſignees or executors with ſuch colluſion. That in this caſe, there was a meeting of the creditors of the bankrupt to conſider, whether it was proper that the aſſignees ſhould bring a bill in order to be let in to a redemption of his eſtate; and the majority of the creditors were of opinion that it was not. That the aſſignees thereupon could not bring this bill, that is, for the benefit of the bankrupt's eſtate. That any

creditor

creditor therefore had a right to bring ſuch bill under peril of coſts.

But, although the power of redemption be an ancient right, which the mortgagor and all claiming under him, whether by voluntary conveyance or otherwiſe, are intitled unto, yet, being a right originating in, and in fact, created by, a court of
2 Vent. 350. equity, it is made ſubſervient to their rules.

Therefore the mortgagor or thoſe claiming through him, on application to the court, will have it decreed to them abſolutely, or under certain conditions according to the nature and juſtice of their caſe.

The court, in the exerciſe of this juriſdiction, views mortgages after forfeiture in two different lights, according to the intereſt of the party from whom the application comes. If the mortgagor ſeeks for redemption he muſt do equity to the mortgagee, or the court will conſider the eſtate as abſolute in the mortgagee. On the other hand, if the mortgagee files his bill to foreclose, the court will enter into the eſſential nature of the contract, and, conſidering the tranſaction merely as a loan, oblige him to ſubmit to be redeemed on the condition originally ſtipulated; the

payment

payment of the principal advanced with legal intereſt.

A ſteady attention to this mode of conſtruction will explain the principles of all the caſes on this head.

Thus where the defendant, being a mortgagee of the premiſes, afterwards purchaſed the ſame *for valuable conſideration*; and the plaintiff, having the title of redemption, would, *before* he redeemed, have had the validity of the mortgage *tried at law*; the court, on reading precedents on the plaintiff's part, was of opinion that, the defendant being a purchaſor for a valuable conſideration, the plaintiff ought to declare whether he would redeem the mortgaged premiſes or not, before he endeavoured to avoid the title; it being againſt the rule of juſtice for the plaintiff to have the equity of redemption from the defendant after he had endeavoured ſo to do; and that, if he would redeem, he ought to pay the defendant all his principal money due thereon with damages and coſts; which he refuſing to do, the court diſmiſſed the bill.

Smith *v.* Valence, 1 Rep. in Cha. 170. Cowper's Rep. 601.

And, where the mortgagor, being an infant, by his guardian had endeavoured to defeat the mortgagee and overthrow his

Ramſden *v.* Langley. 2 Vern. 536.

his title, and the mortgagee prevailed, the latter, on application to redeem, having ſworn he had paid a conſiderable ſum more than his coſts as taxed, was, on the account, allowed all he had expended; and the mortgagee having, (under an apprehenſion that his mortgage would have been defeated at law) got adminiſtration in the ſpiritual court as principal creditor, was allowed the coſts expended there alſo.

Bonham *v.* Newcomb. 1 Vern 232.

So, although the mortgagee cannot compel the mortgagor to redeem before the time agreed upon, *videlicet*, the day appointed for re-payment of the money; yet, if a hard bargain be made againſt the mortgagor, he will be admitted to redeem before that time. As where the plaintiff, being ſeized in poſſeſſion of lands worth 15 *l.* *per annum* and of other lands in reverſion ſubject to incumbrances, in 1657, in conſideration of 320 *l.* demiſed thoſe lands by deed and fine to the defendant for 99 years at 5 *l.* *per annum* rent, upon condition, that if the plaintiff, or his heirs, ſhould pay the defendant 380 *l.* in 1688, then, the conuzees of the fine ſhould ſtand ſeized to the uſe of the plaintiff and his heirs; and the plaintiff covenanted for the defendant's enjoyment accordingly. Within a few years after, this conveyance made, two old lives, on which the reverſionary intereſt depended

Talbot *v.* Braddill. 1 Vern. 183. Ibid. 394.

depended, happening to drop, the eſtate became 45 *l. per annum*; and, in 1682, the plaintiff brought his bill to be admitted to redeem the premiſes, and to have an account of profits from the date of the deed, alledging that, though the deed was in that form, yet, it was agreed between him and the defendant that it ſhould be a mortgage and redeemable at any time upon payment of 320 *l.* and intereſt. And although there was no proof of any other agreement than the deed, and there was a bond to perform the covenants of the deed; and it appeared that the eſtate conſiſted chiefly in old buildings and a mill, and that the defendant had laid out above 100 *l.* in repairs; yet, in regard the plaintiff's mother died within three years after the deed, whereby the revenue exceeded the intereſt of the money; the Lord Keeper, notwithſtanding there was a contingency at the time of the deed, thought this an unreaſonable bargain, and decreed an account of the profits *ab origine*, with redemption on payment of what the profits fell ſhort of the 320 *l.* and intereſt; and his Lordſhip appointed the ſame to be paid at a day certain, not to expect till 1688. according to the condition of the deed.

The Court of Chancery will not allow a purchaſer to oblige a mortgagee in poſſeſſion

Davy *v.* Barker. 2 Atk. 2.

ſion to quit the eſtate to him, unleſs he will firſt pay him principal, intereſt and coſts.

Lant *v.* Criſp. Vin. Abr. Tit. Mort. (T). Ca. 16. p. 467. 2 Eq. Ca. Abr. 599. Pl. 20.

If poſſeſſion be obtained againſt a mortgagee by *fraud*, pending a ſuit, it muſt be reſtored before there can be any redemption.

Pope *v.* Onſlow. 2 Vern. 286. Margrave *v.* Le Hook. Ibid. 207. 1 Vern. 29. 245.

Where the mortgagee firſt lent money to the mortgagor upon a particular tenement, and afterwards advanced him a further ſum on another eſtate; and the latter turned out more valuable than the money due, but the firſt mortgage was deficient in point of value, the court would not ſuffer the one eſtate to be redeemed without the other.

Margrave *v.* Le Hook. 2 Vern. 207. 1 Eq. Ca. Abr. 325. 7. 1 Vern. 245. Max. Eq. 65, 66.

So, if a man makes two ſeveral mortgages of diſtinct lands and then dies, and his heir *endeavours* to defeat the mortgagee of one of the eſtates, by ſetting up an entail, and afterwards applies to redeem; he ſhall redeem both or neither.

Bromley *v.* Hamond. 2 Ch. Ca. 23.

But this rule holds not when the heir claims by purchaſe, and not by deſcent. Thus where *A*, and *B*, tenants for life remainder to their ſon in tail, mortgaged the lands ſo ſettled; *A*, died, and afterwards the mortgagee, finding his ſecurity bad,

gave a third perſon a præmium to procure the ſon, *tenant in tail*, to borrow a farther ſum on mortgage, and then took an aſſignment from the laſt mortgagee; the firſt mortgagee, on application to redeem, inſiſted that, having now gained a good title at law to the lands, tenant in tail ſhould redeem both mortgages or neither: but the court held the ſon to be a ſtranger to the father as to the eſtate-tail, and decreed a redemption on payment of the laſt ſum borrowed with coſts.

A mortgage being aſſignable, a purchaſor ſhall hold it againſt *the mortgagor or his heirs* for the ſum due on the mortgage, although he bought it for leſs than was due, or for leſs than it was worth; for he ſtands in the place of the mortgagee who aſſigned, and who might have given it to him *gratis*. And what was due will be the meaſure of allowance, not what was given, for that might be more than it was worth as well as leſs; and he that runs the hazard if a loſs happens, ought to have the benefit in caſe it turns to advantage.

Williams *v.* Springfield. 1 Vern. 476. 1 Salk. 155. 4.

So, where *A*, mortgaged his lands to *B*, and *C*, a ſtranger, bought the intereſt for leſs than was due on the mortgage, and the heir of the mortgagor brought his bill to redeem; the queſtion was, whether *C*, ſhould

Philips *v.* Vaughan. 1 Vern. 336. Baker *v.* Kellett. 3 Rep. Ch. 23.

ſhould be allowed more than he actually paid? And the Lord Chancellor ſaid that this caſe had neither point nor edge, for there was no colour why, when the heir came to redeem, he ſhould not pay the whole money due on the mortgage: for that if another man had met with a good bargain, there was no equity for the heir of the mortgagor to deprive him of the benefit of it, and take the advantage thereof himſelf.

2 Vent. 353. 1 Vern. 49. 476. 1 Eq. Ca. Abr. 330. 3. 1 Salk. 155. P. 4.

But where a man dies in debt and under ſeveral incumbrances, namely, judgments, ſtatutes, mortgages &c. and the *heir at law* buys in any of them that are of the firſt date; if creditors, who have the later ſecurities, prefer their bill, the incumbrances, bought in, ſhall not ſtand in their way for more than the heir really paid for them. For, a creditor has equal equity with a purchaſer, and the taking away the gain of the latter to ſupply the loſs of the former, is making both equal; and therefore the gain the heir would make, if the whole money due on the incumbrance were allowed him, ſhall be taken from him to make up the loſs of the other incumbrancers upon the eſtate.

Darcy *v.* Hale.

So, if an heir at law, truſtee, executor, or agent compound debts or mortgages, and

and buy them in for leſs than is due upon them; he ſhall not take the benefit of it himſelf, but the creditors and legatees ſhall have the advantage of it; and, for want of them, the benefit ſhall go to thoſe intitled to the ſurplus.

1 Vern. 49.
1 Salk. 155, 4.
2 Atk. 54.

And the equity ſeems to be the ſame if a ſtranger purchaſe, as againſt incumbrancers, creditors, or real purchaſers.

Williams *v.* Springfield.
1 Vern. 476.

Thus, on a Maſter's ſpecial report, to whom the account in queſtion was referred to be taken, it was determined by the court, that an heir or any other perſon ſhould not, as againſt a real purchaſor, be allowed more on any incumbrance bought in than what he paid for it, without regard to what was actually due thereon.

Long *v.* Clopton.
1 Vern. 464.

If an heir purchaſes in an incumbrance on an eſtate charged with portions to younger children, he ſhall be allowed no more than what he really paid for it.

Brathwaite *v.* Brathwaite.
1 Vern. 335.

But if an heir or truſtee buy in incumbrances to protect others to which he is himſelf intitled, the whole money due ſhall be allowed on account, although it was purchaſed for leſs.

Darcy *v.* Hall.
1 Vern. 49.

If the mortgagor become indebted to the mortgagee on other account as well as upon

mortgage, the former debts, as well as the latter, muſt be diſcharged before the mortgagor will be decreed to redeem; for, the condition being broken, the eſtate of the mortgagee is become abſolute at law; and the mortgagor, being obliged to apply to equity to help him, having no remedy at law, will be required to do equity to the party againſt whom he ſeeks to be relieved in equity.

Baxter *v.* Manning. 1 Vern. 244. 3 Salk. 84. p. 7. 2. E. Ca. Abr. 603. pl. 34.

Thus, where the plaintiff made a mortgage to the defendant, and afterwards the mortgagee advanced and lent more money to the plaintiff on his bond; the mortgagor, *on his bill to redeem*, was not permitted ſo to do without paying both debts, although there was no ſpecial agreement proved that the land ſhould ſtand as a ſecurity for the bond debt.

Shuttleworth *v.* Lewick. 1 Vern. 245. Sc. 2. Ch. Ca. 164. Coleman *v.* Wynch. 1 Will. Rep. 775. 1 Vez. 87.

And if the mortgagor die and his heir come to redeem, he alſo ſhall not be admitted to redeem without paying the debt by bond; and the reaſon is, becauſe the heir, after redemption, will be in by deſcent, and, of conſequence, the eſtate aſſets in his hands to pay bond debts; therefore, to avoid circuity, the heir muſt pay both, before he will be permitted to redeem.

St. John *v.* Holford. 1 Ch. Ca. 97.

Thus, where the defendant's grandfather (whoſe heir and executor he was), became bound

bound with *B*, the plaintiff's father (whoſe heir *B*, was), in bonds for 4000 *l.*; *B*, conveyed eſtates by way of mortgage to *A*, to counter-ſecure him; and *B*, afterwards, prevailed upon him to become bound with him for a further ſum of 2000 *l.* The plaintiff's bill being to redeem upon payment of what *A*, had paid or been damnified by the bonds for 4000 *l.* and what remained due thereon; the queſtion was, whether the plaintiff ſhould be admitted to redeem without diſcharging both debts, there being no agreement proved that the mortgage was to be a ſecurity againſt the latter bonds? And it was decreed that, if the plaintiff would redeem, he ſhould reimburſe and ſave harmleſs the defendant againſt the 2000 *l.* as well as the 4000 *l.*

So, if the mortgage be of a leaſe for years, and afterwards more money be lent on bond, if the executor would redeem, he muſt pay both; for the equity of redemption is aſſets in his hands.

Anonymous. 2 Vern. 177. Prec. Cha. 512.

But, if there be ſeveral *incumbrances* upon an eſtate, and the prior incumbrancer claims a bond likewiſe, it will be poſtponed to all others incumbrancers, whether by mortgage, judgment, or ſtatute; for the bond is no charge on the eſtate, and he hath not the ſame equity againſt a puiſne incumbran-

Morret *v.* Haſke. 2 Atk. 52.

cer as againſt an heir at law, who is liable to the bond in *reſpect of aſſets*.

Prec. Ch. 511. 3, 4 W. and M. c. 13. Challis *v.* Caſborn. 1 Eq. Ca. Abr. 325. 9.

And ſince the ſtatute againſt fraudulent deviſes, the deviſee of the equity of redemption cannot redeem without payment of the debt upon bond, and upon mortgage; becauſe the ſtatute makes ſuch deviſe void againſt creditors, and then, the deviſee ſtands in the ſame place as the heir would have ſtood if no deviſe had been made; but, before that ſtatute, ſuch deviſee would not have been liable to a bond creditor.

The defendant need not be originally both mortgagee and bond creditor; for, if he lends the money on the bond and hath the mortgage by aſſignment, there is the ſame equity for him againſt *the mortgagor or his heirs* to have both debts paid.

Halliley *v.* Kirtland. 2 Ch. Rep. 361.

Thus, where *A*, mortgaged lands to *B*, for 60*l.* and was alſo indebted to *C*, 50*l.* on bond, and *B*, aſſigned his mortgage to *C*, the court determined that, as the eſtate veſted was a *chattel leaſe* liable to debts, and *C*, had an aſſignment of it, and the bond debt was juſt, *A*, the plaintiff, ought not to be let into redemption of the mortgage but upon payment of both debts; and it was decreed accordingly.

And,

And, I ſhould apprehend, the aſſignee of the mortgage of a *freehold eſtate* would be intitled to the ſame equity.

If the money due on the bond be lent firſt and the mortgage made afterwards, yet, there is the ſame equity for the mortgagee to have both ſums paid him. So, where *A*, borrowed of *B*, 300 *l.* on bond, and afterwards mortgaged lands to *B*, for 2000 *l.* lent, and then died; the plaintiff, the heir of *A*, prayed a redemption; and the defendant inſiſted that the 300 *l.* was agreed to be ſecured alſo by the mortgage: and the plaintiff was decreed to pay the defendant both debts.

Wyndham *v.* Jennings. 2 Rep. Ch. 247.

This appears to be one of thoſe inſtances in which equity will carry the debt beyond the penalty of the bond, if the principal and intereſt exceed it; for, in this caſe, the obligee is the defendant, and the plaintiff applies for the redemption; therefore if the principal and intereſt exceed the penalty, the plaintiff in equity ought to pay it, for he comes for equity, and it is a maxim that, *he that ſeeks equity muſt do it.*

Peers *v.* Baldwin. 2 Eq. Ca. Abr. 611. pl. 4. 3 Atk. 518.

But, if the mortgagee or aſſignee, to whom money is due on bond, countenance a fraud upon a third perſon, by concealing thereof, he ſhall be redeemed upon payment of the principal money only; ſo, where the plain-

Barrett *v.* Wells. Prec. Ch. 131.

tiff, deviſee of an eſtate ſubject to a mortgage term for 1000 years, let the intereſt run in arrear and gave ſeveral bonds for ſecuring it, and then died; his ſon and heir being about to marry, the intended wife's father applied to the mortgagee to enquire what was due on the mortgage, who, being deſired not to diſcover the bonds, ſaid, that there was only 500 *l.* due, and that all intereſt was paid; and that, upon payment of the 500 *l.* he would deliver up the mortgage. The court held, on application to redeem, that the mortgagee, by concealing the bonds, had diſcharged the lands from being liable to more than what was then pretended to be upon them, and decreed a redemption, upon payment of the 500 *l.* with intereſt from that time, and without coſts.

Reaſon *v.* Sacheverell. infra.

And if part of an original mortgage be paid off, and then a further ſum be borrowed by the ſame parties on a defective title; the laſt ſum muſt be paid off on redemption as well as the firſt.

3 Salk 84. 7.

But, though the mortgagee, when defendant, ſhall have this equity againſt *the mortgagor*; yet, if the latter mortgage his equity of redemption *to another*, the ſecond mortgagee ſhall not be affected thereby; for the bond

bond is but a perſonal charge upon the mortgagor.

So, where the perſon, claiming the equity of redemption, is a purchaſer for a valuable conſideration, the mortgage may be redeemed by him without diſcharging the bond; becauſe the lands, in the hands of the alienee, can be charged with nothing but what is an immediate lien thereon, which the bond is not.

Bayly *v.* Robſon. Prec. Ch. 89. Archer *v.* Snatt. 2 Strange. 1107. Wood *v.* Mortimer. cited in the laſt caſe. 1 Eq. Ca. Abr. 325. 10.

1 Vez. 87. Coleman *v.* Wynce. Prec. Ch. 511.

Nor ſhall a bond be diſcharged on redemption of a prior mortgage, againſt creditors under a deed of truſt of the equity of redemption; for it is only a charge upon the aſſets.

Anon. 2 Vez. 662.

Mortgages are held not to be within the ſtatute of limitations; and, no poſitive time hath as yet been fixed upon, which ſhall be an abſolute bar to redemption, becauſe, courts of equity have conſidered that a mortgagee cannot be injured if he receives his principal, intereſt and coſts; though a mortgagor may, if he be obliged to part with his eſtate for leſs than it's value. But, the making up of accounts, after long periods of time, being very difficult, and attended with great hardſhip on the mortgagee; it hath been thought reaſonable to eſtabliſh a period, at which, *primâ facie*, the right of

redemption ſhall be preſumed to be deſerted by the mortgagor, unleſs he be capable of producing circumſtances to account for his neglect, ſuch as by impriſonment, infancy, coverture, or by having been beyond ſea, and not by having abſconded, which is an avoiding or retarding of juſtice. And, to preſerve an uniformity between the proceedings in courts of law and equity, twenty years after forfeiture and poſſeſſion taken by the mortgagee, no intereſt having been paid in the mean time, hath been fixed upon as the period, beyond which a right of redemption ſhall not be favoured.

Knowles *v.* Spence. 1 Eq. Ca. Abr. 315. 5. Orde *v.* Smith. Sel. Ca. Ch. 9, 10. Ibid. 56. Jenner *v.* Tracey. Note. 3. Will. 288. Belch *v.* Harvey. Ibid. Saunders *v.* Hord. 1 Rep. Ch. 184. Clapham *v.* Bowyer. Ibid. 206.

Per Lord Talbot. in Belch. *v.* Hervey. Note. 3. Will. 288. Quære et vid. infra Rakeſtraw *v.* Brewer.

And as the courts do, *primâ facie*, conſider the redemption as barred after twenty years where there is no diſability in the mortgagor, in imitation of the firſt clauſe of the ſtatute of limitations; ſo, after the diſability is removed, the time fixed for proſecuting in the proviſo, which is ten years, ought likewiſe, it ſeems, to be obſerved.

White *v.* Ewer. 2 Vent. 340. 1 Ch. Ca. 102.

So, at a rehearing before the Lord Keeper aſſiſted by two juſtices, concerning the redemption of a mortgage that had been made above forty years; the court declared, that mortgagors ſhould not be relieved after twenty years; for, though theſe matters in equity were to be governed by the courſe of the court; yet, as, in the

ſtatute

ſtatute of the 21. *James cap.* 16. the legiſlature had adjudged it reaſonable to limit the time of entry to that period, unleſs there were ſuch particular circumſtances as might vary the ordinary caſe, which were therein provided for, it was beſt to ſquare the rules of equity as near the rules of reaſon and law as might be.

And the court refuſed to redeem after thirty-three years, although it was proved by one witneſs that, about *twenty-four years* before the then application to redeem, the mortgagee had told him he was fully ſatisfied and paid all his demands upon the mortgagor. Iſham v. Cole. 1 Rep. Ch. 128.

But the reporter ſays that the court propoſed, in reſpect of the badges of equity in this cauſe in favour of the plaintiff, to do ſomething for the plaintiff which the defendant conſented to.

In the caſe of *Clapham* v. *Boyer*, "That the mortgage had not been redeemed after twenty years forfeiture, and that the eſtate had deſcended to an heir who had ſold the ſame," was, on pleading, held good. Clapham v. Boyer. 1 Rep. Ch. 207.

But, if there be fraud in the tranſaction, as if a mortgage be made by an abſolute deed Ca. temp. Talbot 63.

deed without a defeazance, no length of time will be a bar.

Orde *v.* Smith. Select Ca. in Ch. 9, 10.

Thus, where *A*, for a ſmall ſum of money, mortgaged lands to *B*, and, to deceive the mortgagor, it was expreſſed that the redemption ſhould be made with *A*'s *own money and in his life-time*; *A*'s neceſſities drove him abroad where he died; *B*, afterwards deviſed the money, if the mortgage ſhould be redeemed. On a bill exhibited to redeem, length of time was objected, 41 years having elapſed; but the court decreed a redemption, ſaying, that there was fraud in the original agreement, for the words, *to be paid with his own money*, were thrown in to make *A*, imagine it could not be done otherwiſe.

Comel *v.* Sykes. 1 Rep. Ch. 194.

So, alſo, if there be any legal impediment affecting the perſon having a right to redeem, he may redeem after ſuch impediment is removed, although the period limited by the court be paſt. Thus, where huſband and wife mortgaged copyhold lands, (of which ſhe was ſeized to her and her heirs according to the cuſtom of the manor,) by ſurrender to the mortgagor, which, by non-payment, became forfeited; the mortgagee took poſſeſſion, and diſpoſed of them to his wife for life, with a reverſion to the defendant and her heirs; afterwards the wife, the mortgagor, died, not having been able

to

to redeem during her coverture. The lands were conveyed over. Then the plaintiff her ſon and heir applied to the mortgagee to redeem, and it was inſiſted that he ought not to redeem againſt the alienee of the premiſes, twenty-five years being elapſed; but the court reſolved that, in regard of the impediment in the plaintiff's mother which prevented her redeeming during her coverture, the plaintiff ought to redeem, and decreed accordingly.

But, if the twenty years, conſidered in equity as a preſumptive bar, begin to run, the intervention of a legal diſability in the perſon having a right to redeem, will not prevent the time going on againſt him.

So, where the plaintiff's father, in 1697, mortgaged the lands in queſtion to the defendant, and in 1698, the mortgage being forfeited, the defendant brought his ejectment and recovered poſſeſſion, and on a bill to redeem or foreclose, had a decree accordingly which was ſigned and inrolled in 1701. In 1702, the plaintiff's father died. The plaintiff continued an infant till 1709, when he came of age. In 1721, he brought a bill to ſet aſide this decree and be let into a redemption, on payment of principal, intereſt, and coſts, ſuggeſting therein that the defendant was much overpaid; that the

Floyd *v.* Manſell. Gilbert's Rep. Eq. 185. St. John *v.* Turner. 2 Vern. 418. Knowles *v.* Spence. 1 Eq. Ca. Abr. 315. p. 5.

lands were of greater value; that the proceedings in the decree were *ex parte*; and that there were many irregularities therein. The defendant anſwered to part, and pleaded the decree of foreclosure and enrollment; inſiſting, that it would be againſt practice to ſet aſide a decree, ſigned and inrolled, by an original bill: and the Lord Chancellor diſmiſſed the bill, but without coſts, ſaying, that, in this caſe, the infancy of the plaintiff would not help him, the right to redeem not beginning in his time, but in his anceſtors; for, in all ſuch caſes, the party was barred, and had not 20 years after the impediment was removed.

2 Atk. 333. And ſo it is, although there be coverture or a tenancy by curteſy, yet, if the time begin to run, the diſability will not protect the equity of redemption.

But, where there hath been an account made up on a bill to foreclose within twenty years, though the mortgage be fifty years old, yet the heir of the mortgagor will not be barred; and the reaſon is that, the difficulty of accounting (which is one principal ground upon which the court found their objection to redemption after a great length of time) being removed, no injury will accrue to the mortgagee in being obliged to receive back his principal, intereſt,

intereſt, and coſts. And therefore, where the bill was to redeem a mortgage made in 1642, it appeared the mortgagee entered in 1650, and there were three deſcents on the defendant's part, and four on the part of the plaintiff; but, the length of time being anſwered for the greateſt part by infancy or coverture, and an account having been made up by the mortgagee on a bill brought by him in 1686, to foreclose, the court decreed a redemption and an account from the foot of the account in 1686.

Proctor v. Cowper. 2 Vern. 377. Trin. T. 1700.

And an account ſettled between the mortgagor and mortgagee within the time limited, although there be no bill filed, will preſerve the mortgagor's right of redemption.

Thus, where a mortgage was made in 1713, and the clerk to the ſolicitor for the mortgagor, in order to pay off the mortgage, ſettled an account in 1730, of what was due for principal and intereſt, and no further proceedings were had; yet that was held by Lord *Hardwicke*, on application in 1742, to ſave the right of redemption.

Ano. 2 Atk. 333.

But, although there be a decree to redeem and an account, yet, if it be ſuffered to lie dormant and be not proſecuted within the time limited, the mortgagor and his heirs will be barred.

Thus

St. John *v.* Turner. 2 Vern. 418.

Thus, where *A*, in 1639, demiſed the lands in queſtion to *B*, to counter-ſecure him againſt debts, for which *B*, ſtood bound as ſecurity to the amount of 4000 *l*. In 1649, *B*, entered on his ſecurity, and, by will, deviſed certain ſums out of it to his daughters and the reſt to his ſons. In 1662, the executors allotted the lands among the children of *B*, according to their reſpective proportions. In 1663, a bill was brought by the heir of *A*, to redeem, and thereupon a decree was made to account. The heir died. Afterwards the ſuit was revived by *A*'s daughters, who were co-heireſſes, and, in 1672, an account was again decreed. The plaintiff being of the ſame name as *A*, purchaſed the equity of redemption of the lands in queſtion from the co-heireſſes, and, in 1700, brought his bill to redeem and to have the benefit of the former decrees. But the Lord Keeper diſmiſſed the bill and would not allow the plaintiff to redeem, by reaſon of the difficulty of accounting after ſo great length of time; eſpecially, as the mortgagor had himſelf acquieſced from 1639, to 1663, and neither paid the debt nor ſought a redemption; for though a decree had been obtained, it was not proſecuted.

Orde *v.* Herning. 1 Vern. 418.

But, where there was an agreement that the mortgagee ſhould hold the premiſes until

until he was ſatisfied, time was held to be no bar to the redemption; *not* even though it appeared by the plaintiff's own ſhewing that ſixty years were elapſed.

So, where there was a proviſo in the deed, that if the mortgagor, or his heirs, or aſſigns, ſhould, on a *Michaelmas* day named in the deed or any *Michaelmas* day following, pay to the mortgagee, his heirs, or aſſigns, the mortgage money and all arrears of intereſt which ſhould be then due, then, that the conveyance was to be void; it was held to be in the nature of a conditional purchaſe, ſubject to be defeated on payment of the ſums ſtipulated at any *Michaelmas* day at the election of the mortgagor or his heirs; and that there was an everlaſting ſubſiſting right of redemption, deſcendible to the heirs of the mortgagor, which could not be forfeited at law like other mortgages; and that, therefore, there could be no equity of redemption or any occaſion for the aſſiſtance of the court, but the mortgagor might, even at law, defeat the conveyance by complying with the terms and conditions of it, which were not limited to any particular time, but might be performed at any *Michaelmas* day to the end of the world.

Howell *v.* Price. Prec. Ch. 423.

But, in the caſe of *Hartpole* v. *Walſh*, where *H*, in conſideration of 600 *l.* lent him by

Hartpole *v.* Walſh. 4 Brown's. Parl. Ca. 369.

by *W*, conveyed eſtates to him in fee ſubject to a proviſo That, "the conveyance ſhould be void, whenever *H*, his heirs, executors, adminiſtrators, or aſſigns, ſhould on any laſt day of *June* or *December*, pay unto *W*, or his heirs, the ſum of 600 *l*;" and it was agreed by the indenture that *W*, and his heirs ſhould receive the yearly rent of the premiſes in lieu of his intereſt, with a view to which, poſſeſſion was delivered to him. Afterwards *H*, in conſideration of 2300 *l*. paid by *W*, granted and conveyed the premiſes compriſed in the former mortgage together with others, to him, his heirs, and aſſigns, and covenanted that, whenever *W*, ſhould give to him, his heirs, or aſſigns eighteen months notice by letter in writing requiring payment of the 2300 *l*, *H*, his heirs or aſſigns ſhould pay the ſame with intereſt within eighteen months after ſuch requeſt; and *W*, was in like manner let into poſſeſſion of the laſt mentioned premiſes; a bill for redemption brought, after a period of one hundred years were elapſed, was diſmiſſed, and that decree for diſmiſſion affirmed in the houſe of Lords.

The ground of which decree, as to the premiſes firſt mortgaged, appears to have been, that the compriſing them in the latter mortgage put it in the power of the mortgagee, or his repreſentatives, to aſcertain and limit

limit the time of redemption by demanding the mortgage money, which demand was admitted to have been made by *W.*

Any act of the mortgagee, by which he acknowledges the tranſaction to be a mortgage within 20 years, will take the caſe out of this rule; as, by deviſing the money in caſe the mortgage ſhould be redeemed, or exhibiting a bill to foreclose. Orde *v.* Smith Sel. Ca. Ch. 9. Supra.

So, where a bill was demurred to, becauſe it was to be relieved againſt a mortgage after forty-one years, yet, on a promiſe being proved that the mortgagor ſhould be at liberty to redeem after twenty-ſeven years, the demurrer was diſallowed; becauſe, though forty-one years had paſſed ſince the mortgage, yet, but fourteen had elapſed after the time agreed for redemption. White *v.* Pigeon. Tothill 232.

So, a mortgage was decreed to be redeemed upon the foot of an account ſtated previous to the mortgagee's entering upon the premiſes, notwithſtanding he had been in poſſeſſion forty years; the huſband of the heir of the mortgagee having entered into an agreement with the heir of the mortgagor, about ſeven years before the bill for redemption came to a hearing, for the purchaſe of the equity of redemption. For although, for reaſons ſufficiently evident Conway *v.* Shrimpton. 1 Brown's Parl. Ca. 309. Vin. Vol. 5. p. 505. Ca. 5 2 Eq. Ca. Abr. 596. Ca. 10. 738. Ca. 2.

in the caſe, the court refuſed to decree a ſpecific performance of that agreement, yet, it ſeems to have been conſidered as an admiſſion by the mortgagee that, at that time, he conceived the mortgagor had a right to redeem, which, occurring within ſeven years of the time of exhibiting the bill, brought this caſe within the reaſoning of that immediately preceding.

Palmer *et al.* *v.* Jackſon *et al.* 5 Brown's Parl. Ca. 194.

Upon the ſame principle, a redemption was decreed upon a bill filed fifty-five years after the original mortgage, and forty-ſeven years after the mortgagee got into poſſeſſion, after five ejectments brought to defeat his eſtate by a title paramount, and after refuſal by four different anſwers to come to an account upon the foot of the mortgage, and to redeem. For, the non-redemption for thirty-eight years of the time elapſed, being accounted for, by having been occupied in different ſuits brought by the contending parties, a period of ſeventeen years, only, had ran out between the time of ſettling that diſpute, and the exhibiting the bill to redeem.

And if the mortgagee *ſubmit* to be redeemed, time will be no bar.

Proctor *v.* Oates. 2 Atk. Rep. 140.

Thus, where a bill was brought to redeem after the mortgagee had been in poſſeſſion from

from 1707, to 1732, the year in which the bill was filed; and the defendant, (it being a family affair,) ſubmitted by his anſwer to be redeemed notwithſtanding the length of time; Lord *Hardwicke*, though he ſaid he ſaw no colour for the redemption, yet, on the defendant's ſubmiſſion, decreed an account of what was due for principal, intereſt, and coſts, and directed the plaintiff to pay the ſame in ſix months after the Maſter's report, or, in default, the bill to be diſmiſſed without coſts.

Time will be no bar if the mortgagor remains in poſſeſſion. As, where a perſon had chambers in *Gray's Inn*, and mortgaged them in 1687, but continued the poſſeſſion till 1700; at which time an order of the bench was made to deliver poſſeſſion of the mortgaged premiſes to the mortgagee; upon part of which he entered, but, as to the other part, the mortgagor continued in poſſeſſion till 1708, when he died, leaving the plaintiff an infant, who came of age in 1714. From the death of the mortgagor, the mortgagee had poſſeſſion of the whole. A bill was brought to redeem in 1726, and it was ſo decreed at the Rolls, and the decree was affirmed by Lord Chancellor *King*, who ſaid nothing was more clear than that, if the mortgagor was in poſſeſſion of any part, he ſhould be admitted to re-

Rakeſtraw *v.* Brewer. Sel. Ca. Ch. 55.

deem the whole; for, part of the chambers he might redeem as being in poſſeſſion thereof, and part he could not, ſeparately from the whole; therefore he ſhould redeem the whole. If the mortgagee were in poſſeſſion for twenty years, and no intereſt paid, there ſhould be no redemption allowed. In this caſe the mortgagor was in poſſeſſion of part, till 1708; from 1708, to 1714, the plaintiff was an infant, ſo that was accounted for, and from that time it did not amount to 20 years.

But, in this caſe, the court would not enter into the queſtion, until they were ſatisfied the benchers had given the parties leave to try it at law ſaying, that this regard was to be had to all the ſocieties at law, that all their diſputes might be determined amongſt themſelves; and the court, having determined the right, ordered, that the benchers ſhould ſettle what was due for principal, intereſt and coſts, and take an account of the ſeveral receipts and allowances.

But, there is one caſe in which the legiſlature has thought proper to take from the mortgagor the equity of redemption, and to give the mortgagee an abſolute eſtate in the land; that is, where the former is guilty of a fraud upon the latter by concealing

cealing prior incumbrances. In ſuch caſes it is enacted, by the 4th & 5th *W.* & *M. cap.* 16. that if any perſon ſhall borrow any money &c. or become indebted for any other valuable conſideration, and, for the payment thereof, ſhall voluntarily give a judgment, ſtatute, or recognizance, and ſhall afterwards borrow any other ſum of another, or for other valuable conſideration become indebted to ſuch other, and for ſecuring the repayment and diſcharge thereof ſhall mortgage lands to the ſecond lender, or to any other perſon in truſt for him, and ſhall not give notice to the mortgagee of ſuch judgment &c. in writing, before the execution of the ſaid mortgage or mortgages, ſuch mortgagor ſhall have no benefit in the equity of redemption of the lands mortgaged, unleſs ſuch mortgagor or his heirs, upon notice given by the mortgagee in writing under hand and ſeal, atteſted by two witneſſes, of ſuch former judgment &c. ſhall within ſix months pay off and diſcharge the ſame, and cauſe the ſame to be vacated and diſcharged. And if any perſon, who ſhall once mortgage lands for valuable conſideration, ſhall again mortgage the ſame lands, or any part thereof, to any perſon, the former mortgage being in force, and ſhall not diſcover in writing to the ſecond mortgagee, the firſt mortgage; ſuch mortgagor ſhall have no

relief or equity of redemption againſt the ſecond mortgagee; but ſuch ſecond or third mortgagees may redeem any former mortgage. This act not to extend to bar any widow of any mortgagor of her dower, who did not legally join with ſuch huſband in ſuch mortgage, or, otherwiſe, lawfully exclude herſelf.

Stafford *et al. v.* Selby. 2 Vern. 589. S. C. 1 E. Ca. Abr. 320. 5.

On this ſtatute, it hath been determined, that it is incumbent on the mortgagor, previous to a ſecond mortgage of his lands, to give the ſecond mortgagee notice *in writing*, under his hand, of all prior incumbrances.

Ibid.

That a mortgage, which on the ſtatute becomes irredeemable, although aſſigned over to another in conſideration of what is actually due thereon for principal, intereſt and coſts, ſtill remains irredeemable in the hands of the aſſignee, who may take advantage of the ſtatute againſt clandeſtine mortgages.

Ibid.

That, if a ſubſequent mortgagee redeems ſuch foreclоſing mortgage, he ſhall hold the eſtate irredeemable.

Ibid.

That, if there are *more* lands in the ſecond mortgage than in the firſt, that is a caſe omitted in the ſtatute.

That,

That, the adding an acre or two would not exempt the caſe out of the ſtatute, but would be conſidered as a contrivance to avoid it. Ibid.

That a mortgagee, who claims the benefit of this ſtatute, muſt have conducted himſelf fairly throughout the tranſaction; it being intended to recompence honeſt mortgagees for the trouble, hazard and charge they may be put unto, and not to cover a fraud or ill practice in obtaining a mortgage, or an aſſignment thereof, or in becoming a purchaſor. Ibid.

CAP. VI.

Of a Deviſe of Lands mortgaged.

How *v.* Vigures. 1 Ch. Rep. 33. Supra.

THE mortgagee may deviſe lands mortgaged to him and they ſhall paſs thereby to the deviſee; and if the deviſee exhibit his bill againſt the mortgagor for redemption, or to foreclose, a decree will be made accordingly.

Crips *v.* Gryſil. Cro. Car. 37. Trin. 2. Car. 2.

So, where *G*, the father of the defendant, being ſeized in fee of lands, mortgaged them to *K* and his heirs, with a proviſo for redemption; and afterwards, *K*, by his will in writing, gave all his goods, bills, bonds, mortgages, or ſpecialties for monies to *R K*, and made him his executor and died; the court were of opinion, that the words "*all my mortgages*" made a good deviſe of the lands mortgaged.

But, a diſtinction was formerly taken between mortgages in fee, and thoſe for years; for, if the former were forfeited, it was held that ſuch general words did not convey

vey an abſolute eſtate therein, but at moſt only for life of the deviſee.

Thus, where one ſeized of divers lands in *A*, *B*, and *C*, in fee, the lands in *C* being in him by mortgage, and forfeited, made his will; and, after deviſing the lands in *A*, and *B*, to ſeveral perſons and their heirs, and ſeveral legacies to other perſons, gave *all the reſt of his goods, chattels, leaſes, eſtates, mortgages, debts, ready money, plate, and other goods whereof he was poſſeſſed to his wife, after his debts and legacies paid*, and made her executrix and died; whereupon ſhe entered into the lands mortgaged, and deviſed them to *M*, and his heirs, and afterwards ſhe died. On an *ejectione firmæ* brought by the heir of the mortgagee againſt the deviſee of the wife, the ſole queſtion was, whether the fee in the mortgages paſſed to the wife by this deviſe? And the court were of opinion that *no* fee paſſed; for, that the heir ſhould not be diſinherited nor the fee paſſed away, without an apparent intent ariſing out of the words of the will. And, in this caſe, it did not appear that he intended to paſs but ſuch things whereof *he was poſſeſſed*, which extended only to things perſonal, or leaſes, and not to freeholds whereof he was ſaid in law to be ſeized. And perhaps he was not poſſeſſed of this land; for, it was not found that the mortgagee entered and was in poſſeſſion,

Wilkinſon *v.* Merryland. Cro. Car. 447, 449, 450. Trin. 11 Car. 2.

ſeſſion, and commonly the mortgagor retained the poſſeſſion until forfeiture.

Cro. Car. 450.

In the ſame caſe it was ſaid, it would have been very doubtful whether even an eſtate for life had paſſed to the wife if ſhe had been alive, becauſe the mortgages were coupled with only perſonal things, *as goods, leaſes, eſtates, mortgages, debts, &c.* which might be intended only of eſtates for years; and ſo much the rather, by reaſon of the words "*whereof I am poſſeſſed.*"

And certainly, had the latter point been agitated during the life of the wife, and the deviſor been poſſeſſed of mortgages for years, it would have been decided againſt her; becauſe the queſtion, as taken up by the court, was, whether theſe mortgages in fee were to be conſidered as real or perſonal eſtate? And the unanimous opinion was, that they were of the former deſcription; in which caſe, the words of this will would not have attached upon them: beſides, from the clauſe with the words, "*goods, chattels, leaſes, eſtates, mortgages, &c.*" it could not have been inferred that the teſtator had an intention of paſſing eſtates in fee ſimple, as the ſentence, in which they were included, firſt took notice of an inferior kind of property; but the natural conſtruction would have been, that the teſtator intended mort-

gages

gages for years, which were of equal reſpectability, in conſideration of law, with the leaſes and other property combined in the ſweeping clauſe.

The force of this reaſoning however would have been in ſome degree weakened, if the teſtator had not been poſſeſſed of any mortgages for years; becauſe, in that caſe, either the word mortgages in the will muſt have been totally rejected, which would have been repugnant to every principle of conſtruction; or, he muſt have been underſtood to mean ſuch mortgages as he had: and the rather in this particular caſe, becauſe at this time the queſtion, whether mortgages were to be conſidered as real or perſonal eſtate, turned upon nice and curious diſtinctions, in which few were converſant. And therefore, although if the teſtator had been poſſeſſed of ſuch property as would have anſwered the words of the will, without expounding them to attach upon mortgages in fee, the court would have leaned to a conſtruction which would not injure the heir at law; it being a maxim that *he ſhall not be diſinherited but by expreſs words or neceſſary implication.* Yet, if no operation could have been given to the words of the will, unleſs they had been held to affect the mortgages in fee, I ſhould think, that the ſubject matter being of ſo doubtful

doubtful a nature, the intention would, in this caſe, have been ſtrong enough to have outweighed the claim of the heir.

But now, the nature of mortgages being clearly underſtood, and the tranſaction, (whether the mortgage be in fee, or for years, forfeited or not) until foreclоſure, conſidered as a perſonal engagement only, in which the land is merely a pledge for the money, and remains in the mortgagor to every purpoſe, (except that of ſecuring the loan,) the words, in the principal caſe, would receive a different conſtruction, and carry all the teſtator's intereſt in mortgages, whether in fee or for term of years.

This is evident from the operation of a deviſe of all a man's lands, tenements, and hereditaments; which words, being in law particularly appropriated to real eſtates, and never applied to perſonal eſtates, unleſs when a contrary conſtruction would be, clearly, repugnant to the intention of the teſtator, will not carry mortgages in fee, although forfeited, if the teſtator had other property to which thoſe terms may be properly applied.

Sir Litton Strode *v.* Lady Ruſſel *et al.* 2 Vern. 621.

Thus where *L*, being ſeized of ſeveral manors, of lands in *H*, and of a great perſonal eſtate, having no iſſue, made his will and,

and, after deviſing of part to his wife for life and other legacies, *gave all other his lands, tenements and hereditaments out of ſettlement to his nephew*; *L*, ſubſequent to the making his will, foreclоſed and had releaſes of the equity of redemption of ſome mortgages in fee; one queſtion was, whether theſe mortgages paſſed by the will under the general words, lands, tenements, and hereditaments? And it was unanimouſly agreed by the Lord Chancellor, aſſiſted by the Maſter of the Rolls, Lord Chief Juſtice *Trevor*, and Juſtice *Tracy*, that mortgages in fee, although forfeited when the will was made, did not paſs by theſe general words.

The ſame reaſon that induced the court, in the caſe of *Wilkinſon* and *Merryland*, to determine, that if any eſtate in mortgages in fee paſſed by the words "all the reſt of my goods, chattels leaſes, eſtates mortgages, &c." it was an eſtate for life only, governed the deciſion in the caſe of Sir *Litton Strode* v. *Lady Ruſſell*, that the teſtator's mortgages did not paſs by the words "lands, tenements, and hereditaments;" namely that the words uſed by the teſtator were not properly applicable to the ſubject matter, which it was contended they ought to affect, conſidered at the different periods at which thoſe caſes were determined; a mortgage in fee, when forfeited, being at the time of the deciſion upon the former caſe

caſe conſidered as a real eſtate, which, at the time of the latter deciſion, was ſettled to be only perſonal property.

Nor will looſe words, comprizing general ideas, added to the ſweeping clauſe, lands, tenements, and hereditaments, enlarge the legal effect thereof, ſo as to make them extend to mortgages; eſpecially, if the lands mortgaged be of larger value than the eſtates to which theſe words properly apply.

Sir John Wynne *v.* Sir Thomas Littleton. *et al.* 2 Ch. Ca. 51. Sc. 1 Vern. 3. Sc. 2 Vent. 351. Sc. Swinb. 504.

And therefore where *P*, ſeized of lands in the counties of *F*, *M*, and *D*, conveyed them to *G*, by way of mortgage, and *W* was party thereto, and covenanted to pay the money if *P* failed; in which caſe *G* was to convey to him, which on *P*'s neglect was done. *W*, entered on the lands, and enjoyed them divers years; and being ſeized thereof, and alſo of other lands in other counties in *Wales*, (whereof part lay in the county of *M*, as part of the mortgaged lands did), but of no lands in *F*, and *D*, except thoſe mortgaged, made his will, and thereby deviſed all his lands, tenements and hereditaments in the counties of *A*, *M*, and *C*, or in any or either of them, *or elſewhere* within the dominion of *Wales* to *J W*, and his heirs, and deviſed a rent-charge of 80 *l. per annum* iſſuing out of the ſame lands: and, after the bequeſt of ſeveral

great ſums and legacies, bequeathed all the reſt of his goods, chattels and perſonal eſtate whatſoever, (his debts, legacies and funeral expences being firſt paid,) unto his loving——whom he made ſole executor of his laſt will, and left a blank unfilled up; the queſtion was, whether the lands mortgaged ſhould paſs to *J W*, by this deviſe, or, whether the adminiſtratrix ſhould have them? And it was decreed in favour of the adminiſtratrix for theſe reaſons; firſt, that the teſtator made ſpecial mention of the three counties in which his own lands of inheritance laid, not of the counties in which the mortgaged lands laid, but only added the general clauſe, *currente calamo* "or *elſewhere* within the dominion of *Wales*;" that, having firſt deſcended to particulars, he had thereby ſo limited and circumſcribed his intention that the general fortuitous clauſe could not open or enlarge it; for, that was but in the nature of an *et cætera* which might ſerve to fetch in ſmall parcels of land, that were the teſtator's own inheritance laying out of the three counties particularly mentioned, (of which in truth theſe were ſome), but could never reach the mortgaged lands which were of a different nature; and, the rather in this caſe, becauſe they were of great value, equivalent to, if not exceeding, the value of his other lands, and therefore might not paſs by

by ſuch a general clauſe, as if only ſkirts and members of the other lands.

Secondly. Becauſe the will had charged the lands that paſſed by the deviſe *of all his lands*, with a rent-charge for life, and no one could be thought ſo improvident as to grant a rent for life out of lands, which were every day redeemable.

But it was obſerved by the court, that it might have been otherwiſe; ſuppoſe the deviſe had been, of all his lands in the ſaid three counties, and then, without more ſaid, "that the reſt of his perſonal eſtate ſhould go to his executor," for then, perhaps, the mortgaged lands would paſs; as otherwiſe, there would have been nothing to anſwer, or make ſenſe of that clauſe, "*and the reſidue of his perſonal eſtate &c.*" for that would have implied that he had already deviſed ſome part of it, or at leaſt, evinced, that he meant part of it ſhould have paſſed: but, as this caſe was, theſe words were well underſtood, and they effectually anſwered without any ſuch conſtruction, for, before that clauſe in the will, the teſtator had deviſed divers legacies that in the whole did amount unto 1500*l.*

But, if the teſtator hath no other landed intereſt anſwering the deſcription given in his

his will in point of ſituation and circumſtances except mortgages, they will paſs by ſuch general words though not *technically* proper to the ſubject.

Thus, in the caſe of *Clarke v. Abbot*, where *I*, poſſeſſed of a mortgage of the *Swan Inn* at *Chelſea*, made his will, and thereby deviſed to *A.* and his heirs "all his *freehold* meſſuages, and garden grounds in *Chelſea*."—It was held, by Lord *Hardwicke*, on a queſtion whether the mortgaged intereſt would paſs by this deſcription, that, as it did not appear that the teſtator had any other lands there, it certainly would.

Clarke *v.* Abbot Barnard Rep. 457. Sc. 2 Eq. Ca. Abr. 606. 41. Infra. 176.

Yet, it is obſervable on this caſe that, the word "*freehold*," could with leſs propriety be applied to the caſe of a mortgage, *than* the words, "*lands, tenements, and hereditaments*;" the latter being much more general in their nature, and more frequently uſed as ſweeping terms, to comprize all property, not particularly deſcribed.

If a deviſe be made of lands mortgaged, no decree, to redeem or be foreclоſed, can be made againſt the heir of the deviſor, but only againſt the mortgagor and his heirs.

How *v.* Vigures. Supra. 152.

A deviſe of money on mortgage does not carry the intereſt due at the time of the death of the teſtator.

Roberts *v.* Kyffin. Barnard 259.

Thus, where *R.* made his will, *and thereby gave to T.* 300 *l. which he had at intereſt, ſecured by a mortgage on the eſtate of M;* and alſo gave him *all the meſſuages, lands, and tenements* conveyed for ſecuring the payment of that money, *until the ſame ſhould be paid and diſcharged*; and, ſoon after making his will, died, at which time two months intereſt was due on the mortgage. The Lord Chancellor was of opinion, on exceptions to the Maſter's report, that only the principal ſum of 300 *l*, which was ſecured by the mortgage, paſſed by the will, and that the deviſee was not intitled to any intereſt due thereon. His Lordſhip ſaid that, if there had been only the firſt clauſe in the will, it would have been extremely clear that only the principal ſum paſſed thereby, and that the intereſt due did not paſs; for, that clauſe could have conveyed nothing but the principal ſum of 300 *l.* for which the mortgage was made a ſecurity. And his Lordſhip compared this to the caſe of a man's giving a bond to another in which a third perſon was become bound to him; *there*, the principal ſum only paſſed, and not the intereſt incurred upon it in the life of the party; the reaſon of which was, that

that the teſtator appeared to have intended to convey ſomething that was certain, and not that which was uncertain. The queſtion then was, whether the ſubſequent words "*And alſo I give him all the meſſuages, lands, &c.*" made any difference? Had this clauſe gone no further than to have conveyed the meſſuages, lands, and tenements ſecured for the payment of the money, it might have been more doubtful, whether, under theſe words, the intereſt might not have paſſed as well as the principal. For it might have been ſaid that thoſe words were only deſcriptive of the lands that were mortgaged, and that, under thoſe words, the teſtator might have intended to have given the whole that was ſecured, namely, the intereſt as well as the principal. However his Lordſhip ſaid that would have been a ſtrained conſtruction. But the words in this clauſe did not reſt there, for they went on and ſaid "*until the ſame ſhould be paid and diſcharged,*" that was, until the 300 *l.* be paid and diſcharged. And from thence an argument might be drawn that nothing but the 300 *l.* was intended to paſs: beſides the ordinary rule in the conſtruction of wills was that, *where a former clauſe in a will was expreſs and particular, a ſubſequent clauſe that was dark and obſcure ſhould not enlarge it.*

Ellis v. Gnavas. 2 Cha. Ca. 50. Infra.

A doubt is made by the reporter of the caſe of *Ellis* v. *Gnavas* (determined in the 32. and 33. *Car.* 2. which was between two and three years after the making of the ſtatute of frauds) whether, if a mortgagee had deviſed the mortgaged lands by will in writing, but not atteſted according to that ſtatute, and the will had been proved in the Eccleſiaſtical Court, the deviſee or executor ſhould have the land or money, when, *clearly* the deviſor meant the executor ſhould not have it? The anſwer to which queſtion ſeems, to me, to depend upon the ſolution of another, namely; whether a deviſe by a mortgagee of lands, mortgaged to him, be within the fifth ſection of the ſtatute of frauds? For if it be, the intention of the deviſor, however ſtrongly expreſſed, will not affect the property deviſed, or interrupt it in its courſe from the teſtator to thoſe, to whom, by the deſignation of the law, it would have paſſed, had no ſuch will been made or intention expreſſed: unleſs the circumſtances required thereby, (among which, is that of being ſigned by the party deviſing, or ſome other in his preſence and by his direction, and ſubſcribed in his preſence by three or more witneſſes,) had been actually complied with.

1 Show 89. Edleſtone v. Streaks. Carth. 79. 81. 3 Mod. 260. 1 Show 68. 88. Lee v. Libb. Carth. 35.

I have not, in the courſe of my reſearches upon this ſubject, met with any caſe expreſſ-

ly determined upon this point; the reaſon of which I apprehend to be, that it has been univerſally held to be out of the ſtatute, the words of which are, that "all deviſes of *lands and tenements* ſhall be in writing &c." which words, being confined to real property only, clearly exclude mortgages. For, as the words, lands, tenements and hereditaments, in a deviſe, have been determined not to include mortgages, if there was any other ſubject in the will upon which they would operate, becauſe thoſe words are applicable to real property: ſo, they muſt be held to exclude mortgages, when made uſe of in a ſtatute; the intent of which is, to reſtrain the diſpoſition of real property by deviſe, unleſs the circumſtances, thereby required, are complied with.

2 Burr. 978.

Sir Litton Strode *v.* Lady Ruſſel.

Supra. 156.

And, although I have found no caſe expreſsly determined upon this particular point, yet, it is a concluſion neceſſarily reſulting from the ſecond reſolution of the court in the laſt mentioned caſe, *viz.* that, although the teſtator, after making his will, foreclоſed the mortgages or obtained a releaſe of the equity of redemption, yet, they would not paſs by the words, lands, tenements, and hereditaments contained therein, but would go to the heir at law: the reaſon of which reſolution is plainly,

Sir Litton Strode *v.* Lady Ruſſel.

Supra.

that they are in the nature of new purchaſes, which the teſtator had not, at the time of the making his will; and therefore, by law, could not paſs thereby, however ſtrong the intention of the teſtator might be that they ſhould.

CAP.

CAP. VII.

Of priority of Incumbrances in Law and Equity, in which the Doctrine of tacking prior and latter securities together is considered.

ON appeal to the House of Lords in the case of *Symes et al.* v. *Symonds et al.* it was settled that, if there be several mortgages or other incumbrances upon the same estate, the first incumbrancer, who has the legal estate, shall be preferred to the second, and so on, according to the periods at which their respective securities bear date; and that mortgages were not to be preferred, but will take place according to priority, and as they stand in order of time with statutes, judgments, and recognizances.

Symes *et al.* creditors by judgment of Sir. W. Bassett *versus* Symonds *et al.* creditors by mortgage. 1 Brown's Parl. Ca. 66.

So, in another suit respecting the same estate, the case was, Sir *W. B.* in 1687 borrowed one thousand pounds of lady *B. on a judgment*; at that time there was a term

Lord Bristol *et al.* creditors of Sir William Bassett *v.*

Hungerford *et al.* 2 Vern. 524. 1 Eq. Ca. Abr. 142. Ca. 5.

of five hundred years kept on foot and aſſigned to *N*, lady *B*, and *S B*, to attend the inheritance. Afterwards, in 1688, Sir *W. B*, and *N* one of the three truſtees aſſigned the term to *W.* and *M.* for ſecuring one thouſand five hundred pounds borrowed of them by way of mortgage: then *Sir* W. B. *together with the two other truſtees*, viz. *Lady* B, *and* S B, *aſſigned the term to* G, for the better ſecuring the 1000 *l.* due to Lady *B*; the queſtion was, whether *W.* and *M.* ſhould have the benefit of the whole term or only of a third part of it, one only of the three truſtees having joined in the aſſignment? It was inſiſted that, although but one third part paſſed as to the legal eſtate, yet, the *ceſtuy que truſt* could make a good aſſignment in equity, and Lady *B.* ought to be bound thereby; becauſe ſhe lent her money on the credit of the judgment, and, before the aſſignment to *G*, had notice of the aſſignment to *W.* and *M.* But, the Lord Keeper determined that, although there was a term attendant, yet, a judgment was an equitable lien on the inheritance, and, conſequently, affected the term; and therefore Lady *B*, having got the legal eſtate as to two thirds of the term in *G*, in truſt for herſelf, ſhould have the benefit thereof, although ſhe had notice of the mortgage and aſſignment, made

by

by the *ceſtuy que truſt*, jointly with one of the truſtees.

So, where there was a firſt mortgage which was paid off, but no reconveyance, and next *a judgment creditor*, and the plaintiff, a ſecond mortgagee, filed a bill againſt the firſt mortgagee, the mortgagor, and judgment creditor, to have a reconveyance from the firſt mortgagee, (he being ſatisfied,) which he acknowledged by anſwer; the firſt mortgagee, pending the ſuit, aſſigned the mortgage to the judgment creditor; and the Lord Chancellor declared this to be juſtifiable in both: and decreed that, unleſs the plaintiff, the ſecond mortgagee, would redeem, and alſo pay off the debt by judgment, the bill ſhould be diſmiſſed.

Turner *v.* Richmond. 2 Vern. 81.

We muſt here remark, with a view to ſome obſervations that will hereafter occur in this chapter, that, in the two laſt mentioned caſes, the aſſignments of the legal eſtate were not made with a view to alter the priorities amongſt the claimants, but, to preſerve them as they originally ſtood.

But, the laſt propoſition, as to the diſcharging incumbrances, muſt be underſtood with this reſtriction, that the firſt mortgagee be not guilty of any fraud or artifice, by concealing his mortgage, or otherwiſe, to induce another perſon to give credit

to,

to, or lend his money on, ſuch ſubſequent ſecurity; for, if he be, the ſubſequent incumbrancer will gain a priority thereby.

Berrysford v. Millward. Barnard Rep. 101. Sc. 2. Atk. 49.

Thus where, on a treaty of marriage between *A.* and *B.* his wife; *C.* the father of *A*, and *D.* the father of *B*, had a meeting together, at which meeting *M*, who had a mortgage upon *C*'s. eſtate, was accidentally preſent; *C.* and *D.* diſcourſed together on the ſubject, and talked of making a ſettlement upon the eſtate on which the mortgage to *M.* was ſecured: *M.* never mentioned to the father of *B*, that he had ſuch mortgage, but called out *C.* and reminded him thereof. *M.* then agreed with *C*, that he would take his perſonal ſecurity for the money, and they returned into the room together, when an agreement was entered into between *C.* and *D.* in the preſence of *M.* to ſettle the eſtate in ſtrict ſettlement. Afterwards the marriage took effect, and *M.* brought an ejectment to recover the poſſeſſion of this eſtate as mortgagee; whereupon *A.* and *B.* his wife brought a bill againſt *M.* and *C.* in order to have a perpetual injunction: *M.* admitted all the facts, but pretended not to remember any thing of the agreement to accept *C*'s perſonal ſecurity for the money lent. *C.* was examined as a witneſs in the cauſe for both parties, and ſwore to the fact of that agreement: and the Lord Chancellor

cellor was of opinion, that the plaintiffs were well entitled to a perpetual injunction, and ought to be relieved under the *head of fraud*; for that *M*, having voluntarily concealed his mortgage at the time of the treaty of marriage, was not intitled to have any benefit, from it, againſt the plaintiff.

The equity of the latter incumbrancer will be ſtill much greater, if the firſt incumbrancer be concerned in tranſacting the ſubſequent ſecurity, and omit to inform him of the prior demand.

So, where *D. N.* and *H.* having lent *B.* 8000*l.* upon a mortgage in fee of the manor of *F*, and on a ſtatute in 16000*l.* penalty as a further ſecurity; and *H*, being a counſellor and afterwards conſulted by *J*, as to a loan of 2000*l.* to *B.* on a mortgage of the manor of *G*, encouraged him to lend his money, drew the mortgage-deed, and inſerted therein a covenant that the eſtate was free from incumbrances, making no mention of the ſtatute which was taken, becauſe *T.* was ſuppoſed to be deficient. The queſtion was, whether *H.* ſhould be admitted to take advantage of the ſtatute to leſſen *J*'s ſecurity upon the manor of *G*? And it was held he ſhould not; for, if he, who only concealed his incumbrance, ſhould be poſtponed, much more ought *H*, who was in-

Draper *et al.* *v.* Borlace. *et al.* 2 Vern. 370.

truſted

truſted as counſel by the mortgagee, promoted the loan, and drew the conveyance with covenants that the eſtate was free from incumbrances.

Moratta *et al.* *v.* Murgatroyd. 1 Will. Rep. 393.

And, if a firſt mortgagee be a witneſs to a ſecond mortgage-deed, and, knowing the contents thereof, do not acquaint ſuch ſecond mortgagee with his former mortgage, this will give the latter a preference.

Ibid.

It is likewiſe ſaid, that it will make no difference, although it be not in proof that the witneſs knew the contents of the ſecond mortgage; for, ſince it does not appear but that he might have known them, the law will preſume that every witneſs, who can write or read, is acquainted with the ſubſtance of a deed or inſtrument which he, having atteſted, undertakes to ſupport by his evidence.

Sed quær.

This, though rather hard, ſeems to me perfectly conſonant to the principle of equity that where, of two perſons, one of whom has been guilty of a neglect, and the other has not, there muſt be a ſufferer, the loſs ſhall light on him from whoſe omiſſion the miſchief ariſes.

Hobbs *v.* Norton. 1 Vern. 136.

Thus, where *N*'s. younger brother, having an annuity of 100*l.* *per annum* charged

on

on lands by his father's will, contracted with *H.* for ſale thereof; *H.* went to *N*, and informed him of his intended purchaſe, deſiring to know of him if his younger brother had a good title to it, and whether his father was ſeized in fee at the time of making the will, and if it had ever been revoked. *N.* told him he believed his brother had a good title and that he had paid him the annuity for 20 years; but, at the ſame time informed him, that he heard there was a ſettlement made of his father's lands before the will, which was in the hands of *T*, but that he had never ſeen it, and therefore could not tell what were its contents; and encouraged the purchaſe, telling *H*, he had not only paid his brother the annuity to that time, but had alſo paid his ſiſters three thouſand pounds under the ſame will. The purchaſe was compleated, and afterwards, *N.* got the ſettlement into his hands and would have avoided the annuity, the lands being thereby intailed. *H*'s bill was to have the annuity decreed or repayment of his purchaſe-money; and though, on the hearing, there was no proof that *N.* had any notice of the contents of this ſettlement at the time he promoted the purchaſe, yet, the Lord Keeper decreed the payment of the annuity merely on the encouragement *N.* gave *H.* to proceed in compleating the contract; for, that it was a negligent thing in him not to

have

have made himſelf acquainted with his own title, that he might have informed the purchaſor of it, when he came to enquire of him.

Head *v.* Egerton. 3 Will. 280. 1 Vez. 360.

So, where *S.* made a mortgage of lands to *H*, who, placing great confidence in him, lent the money, taking his word that he would deliver him the title-deeds, the mortgage being executed in *London* and he pretending the title deeds were in the country. Aftewards *S.* borrowed 2000 *l.* of *E.* on a mortgage of the ſame lands, at the ſame time producing and delivering to him all his title-deeds, which were peruſed, and the title approved by his counſel. Then *H.* exhibited a bill to foreclоſe *E*, and to compel him to diſcover the title-deeds relating to the premiſes and to have them delivered up to him, inſiſting upon them, as owner of the land. *E.* pleaded the mortgage made to him, and that he had no notice of the prior mortgage to *H.* and inſiſted, that the court ought not to aid *H.* and take the title-deeds from him, without ordering him to be paid his mortgage money; and ſo it was decreed by the Chancellor, who ſaid, that it was hard enough upon *E*, that he had lent his money upon lands ſubject to a prior mortgage, but he having no notice thereof, his Lordſhip would not add thereto by taking away the title-deeds, unleſs he was paid his money;

eſpecially, in a caſe, where *H.* had been in ſome meaſure acceſſary in drawing in *E.* to lend it, by permitting *S*, the mortgagor, to keep the title-deeds in his poſſeſſion, the delivery of which *H.* ought to have inſiſted upon when he took the mortgage.

But, in the principal caſe, if ſuch prior mortgagee had been drawn in to be a witneſs with a view to cheat him of his ſecurity, and there were no fraud or ill intention on his ſide, in that caſe, I ſhould think, his priority would not be loſt.

And, if ſuch ſubſequent mortgagee apply, to a prior incumbrancer, to know if he hath any incumbrance or mortgage on the eſtate upon which he intends to take a ſecurity, and he denies that he hath any, he will loſe his priority.

But, in this caſe, it will be neceſſary for ſuch ſubſequent mortgagee, or his agent, to inform the prior incumbrancer that he is about to lend the mortgagor money, or otherwiſe he will not on denial loſe his priority; for he is not bound to anſwer unleſs he knows of ſuch intention, as the queſtion may be put, merely, to ſatiſfy an impertinent curioſity.

Thus,

Ibbottſon *v.* Rhodes. 2 Vern. 554.

Thus, where *R.* had lent money to *S.* upon a mortgage of his eſtate, and *I*, being likewiſe about to lend *S.* money, directed, *G.* to inquire of *R*, whether he had any incumbrance or mortgage on that eſtate, who denied that he had, and on a ſecond application returned the ſame anſwer; *R.* acknowledged that *G.* met him in a public market, and inquired of him, what money *S.* owed him, but denied that *G.* informed him *I.* was about to lend *S.* money; nor did *G.* on croſs examination, take upon himſelf to ſwear he did; the Lord Keeper directed an iſſue to try whether *G.* told the defendant that the plaintiff was about to lend money on the eſtate of *S*, when he enquired what *S*'s debt was.

2 Vez. 477. Ca. Temp. Talbot 68.

And if there be ſeveral equitable intereſts affecting the ſame eſtate, they will attach upon it according to the reſpective periods at which they commenced; for, it is a maxim in equity as well as in law, that, "*Qui prior eſt tempore potior eſt jure.*"

Clarke *v.* Abbot. Barnard Rep. 457. Sc. 2 Eq. Ca. Abr. 606. 41. Supra.

So, where *Job Smith* and *Samuel* his ſon mortgaged an eſtate by feoffment to *Winter*, and *Samuel* afterwards died, leaving *Elizabeth Smith* his heir, who married *Thomas Bromwich*; *Thomas took an aſſignment of the mortgage in the name of* Anthony Bromwich *in truſt for himſelf.* Then *Thomas* mortgaged the ſame premiſes to *Elizabeth his*

his ſiſter. Afterwards, *Thomas* deviſed theſe premiſes to *Anthony Abbot* his grandſon and his heirs. At the time of making this will he had two daughters, *Anne*, married to *Robbert Abbot*, and *Elizabeth*.—*Thomas* died, his wife ſurviving; then ſhe died, and *Elizabeth* the daughter married *Peter Newley*. A bill was then brought, by *Peter* and *Elizabeth* his wife, againſt *Robert Abbot* and *Anne* his wife, *Anthony Abbot*, and *Robert* the ſon of *Robert*, praying to be let into a redemption of a moiety; inſiſting, that *Thomas* had only a redeemable intereſt and no power to diſpoſe of the inheritance; *and the court decreed a redemption as to a moiety.* This decree was never carried into execution, and *Anthony Abbot* was permitted to continue in poſſeſſion until his death. In 1720. *Anthony* mortgaged the premiſes to *Taylor*, and, in 1724, again to *Nicholas*, and afterwards made ſeveral other mortgages to *Nicholas*, and then died, leaving *Anthony* his heir at law. Then *Peter Newley* and *Elizabeth* his wife, and *Anne* who was the widow of *Robert Abbot*, for divers conſiderations, conveyed the premiſes to *Robert* the ſon of *Robert* and his heirs, who afterwards took an aſſignment of *Taylor*'s mortgage. In this ſame year *Nicholas* aſſigned his mortgages to *Clarke*. Then *Elizabeth* the ſiſter of *Thomas* died, having firſt made her will and *Peter Newley* executor thereof, who alſo

died leaving *Thomas Newley* executor of his will. Then *Thomas Newley* aſſigned all his intereſt in the mortgage to *Clarke*, who now brought his bill againſt *Robert Abbot*, *Anthony Abbot*, and *Elizabeth Abbot*, praying that an account might be taken of what money was due to *Robert*, on the aſſignment of the mortgage which was made to him by *Taylor*, and that the plaintiff might redeem him; and that *Anthony* and *Elizabeth* might come to an account as to the mortgages which were aſſigned to him, and be decreed to pay thoſe ſums to the plaintiff, together with the money which he ſhould pay to *Robert*, and, in default, that *Anthony* might be foreclоſed. And the Lord Chancellor was of opinion, that the plaintiff, was intitled to relief, as far as he could take that relief, within the compaſs of the former decree; that, if the plaintiff had got the legal eſtate either himſelf, or in a truſtee for him, ſo that he could have brought an ejectment and put the defendants to have been plaintiffs here, it might have deſerved conſideration, whether theſe defendants would have been intitled to have redeemed the preſent plaintiffs; but, as the plaintiff had not the legal eſtate and was forced to come into equity, he muſt ſubmit to be redeemed by *Anthony Abbot*, and could put no other terms upon his redeeming him, than ſuch as fell within the compaſs of the former decree.

His

His Lordſhip ſaid that "*Qui prior eſt tempore potior eſt jure*" was a rule that held in equitable as well as in legal rights. That, in this caſe, *Robert* had the firſt equitable right, and therefore his mortgage muſt be paid off in preference to that of the plaintiff. It was true the plaintiff had taken in the mortgage made to *Elizabeth*, the ſiſter of *Thomas*, which was prior to *Taylor*'s mortgage under which the plaintiff claimed, but he had no legal eſtate, for want of taking in an aſſignment from *Anthony*, or, at leaſt for want of having him before the court in order to have a conveyance; and therefore *Robert*, who had the aſſignment of the mortgage which was made to *Taylor*, previous to any aſſignment of the mortgage which *Clarke* took, muſt be preferred to him: and his Lordſhip ſaid, that it was never determined that a *puiſne* mortgagee could protect himſelf againſt a prior mortgagee, by purchaſing a mortgage previous to his where there was no legal eſtate in that mortgagee from whom he took his ſecond aſſignment; eſpecially, without bringing the truſtee of that mortgage before the court.

But this general rule admits of an exception where any one of the parties hath more equity to call for the legal eſtate than the others; for, he that hath more equity ſhall be preferred.

2 Vez. 486. Wilker *v.* Bodington. 2 Vern. 608. Infra.

Wyndham *v.* Richardſcn *et al.* 2 Ch. Ca. 213. Infra. 185.

So, in the caſe of *Wyndham* againſt *Atkins et al*, where the defendant acknowledged the money was not paid by him for a ſtatute purchaſed in to cover his mortgage, but offered to pay it on the aſſigning the extent; it was argued, that *puiſne* mortgagees were, in ſuch caſe, protected againſt a former mortgage on this reaſon only; becauſe they were intitled in equity, by actually laying out their money on their mortgage, and were intitled in law, by purchaſing in the former incumbrance: and ſo, having a title both in law and equity, he that had only a title in equity ſhould not prevail againſt both. But the defendant had no title in law, for, though the ſtatute was extended, yet, it was not aſſigned to him, he not having paid for it, and the plaintiffs offered to diſcharge him of that. But the Lord Chancellor was ſtrongly againſt them on this point.

It is a rule in equity, that, where ſeveral perſons have equal equity, he amongſt them that hath poſſeſſion of the *legal eſtate* may make all advantages of it that the law admits of, and thereby protect his title, although it be ſubſequent in point of time; and his adverſaries ſhall have no help in equity, for, it will not diſarm a purchaſer, but, where the equity is equal, will leave the law to prevail.

Therefore

Therefore, if there be ſeveral mortgagees, the laſt mortgagee, having lent his money upon a valuable conſideration and *without notice*, may, by purchaſing in the precedent incumbrance *which carries with it the legal eſtate*, protect himſelf againſt any mortgagee ſubſequent to the firſt and prior to the laſt; for then he will have both law and equity upon his ſide.

Boovey *v.* Shipwick. 1 Ch. Ca. 201. Churchil *v.* Grove. 1 Ch. Ca. 35. 1 Vern. 187, 188. 2 Vez. 573.

This privilege of protection, by purchaſing in prior incumbrances, originates in the particular conſtitution of the legal juriſdiction of this country. It could not happen but where the adminiſtration of law and equity was divided among different courts, and created different kinds of rights in eſtates; and is grounded upon that force which courts of the latter deſcription, neceſſarily and rightly, give to the common law and to legal titles. For, although they break in upon the common law where neceſſity and conſcience require it, ſtill, they allow ſuperior force and ſtrength to a legal title to eſtates when not urged to do otherwiſe by thoſe motives; and, conſequently, where there is a legal title and equity on one ſide, and equity only upon the other, they will never ſuffer the ſide, in which, both theſe rights concur, to be hurt by that, in which, one of them only is to be found.

2 Vez. 574.

Higgon *v.* Callamy *et al.* 1 Ch. Ca. 149. *et vid.* Churchill *v.* Grove. Ibid. 35. Sc. Infra.

Thus, where *S*, having granted a rent-charge for 2000*l.* to *H*, mortgaged the premiſes for 1200*l.* to *C*, and, afterwards, thoſe that had *C*'s intereſt, he being dead, bought in a judgment precedent to the grant of the rent-charge; *H.* exhibited his bill to diſcover what eſtates *C.* claimed, and charged that *C.* had notice of *H*'s rent-charge before he took the mortgage. The defendants pleaded the mortgage to *C.* and that, afterwards, hearing of precedent incumbrances, they bought in a legal title prior to the plaintiff's; and offered to aſſign all to the plaintiff, if he would pay what was due on the mortgage and on their new acquired title; but, if he would not, they inſiſted that they ought not to be obliged to diſcover what that eſtate was they had bought in; and that their title ought not to be drawn under examination in equity; and, by way of anſwer, they denied that, to their knowledge and belief, *C.* had any notice of the rent-charge when he lent the 1200*l*, which plea, on debate, was allowed to be good.

And this point was fully ſettled in the following caſe by a ſolemn determination by Lord *Hale*, who gave it the name of the "*creditors Tabula in naufragio.*"

Thus,

Thus, *E*, being ſeized of the manor of *W*. and of the manor of *M*, mortgaged part of the manor of *W*. to *B*, in 1649, for 1000 *l*. and, in 1655, acknowledged a ſtatute to *B*. of 800 *l*. for the payment of 400 *l*. afterwards, in 1662, *E*. mortgaged both theſe manors to *D*. for 7000 *l*, and then, in 1665, mortgaged the manor of *W*. to *L*. for 2000 *l*. *L*. *having no notice of the the former mortgages*. *L*, coming to have notice of the mortgage to *D*, purchaſed in the two incumbrances to *B*. and then *W*. executor of *D*. ſued *L*. who pleaded the whole matter: and the court held, that *L*. might make uſe of theſe incumbrances to protect his own mortgage, he having both law and equity for him. Firſt, he had law, for *that* he had a precedent mortgage in 1649, and alſo the ſtatute in 1655, and, while theſe remained in force, *M*. could not come in. Secondly, he had equity, for, though he had a ſubſequent mortgage, yet, it being without notice, he ought to be relieved in Chancery.

Marſh *v*. Lee. 2 Vent. 337. S. C. 1 Ch Ca. 162.

But, if the prior incumbrance attach upon part of the eſtates compriſed in the latter mortgage only, it will not protect more than what is compriſed in the firſt ſecurity.

And therefore, if a man, being ſeiſed of ſixty acres, mortgage twenty to *A*. and then

Per Lord Hale. 2 Vent. 339.

then the whole to *B.* and then the whole to *C.* and afterwards *C.* purchaſe in the firſt mortgage, *that* ſhall not protect more than the twenty acres; but, it ſhall protect thoſe twenty acres, ſo as *B.* ſhall never recover them, until he pay *C.* all the money due upon the firſt and laſt mortgage.

Marſh *v* Lee. Supra. 183.

And ſo it was determined in the caſe of *Marſh* and *Lee.*

But, if the prior incumbrance, bought in, attaches upon other eſtates, as well as upon thoſe affected by the ſubſequent mortgage, the ſubſequent mortgagee ſhall hold all the eſtates comprized in the incumbrance bought in, until he be ſatisfied as well for his own debt as for what he paid in the purchaſe of the firſt mortgage. For, when he hath purchaſed the precedent incumbrance, which comprehendeth more than is contained in his mortgage and is forfeited at law, it is but reaſonable that the eſtate, which by no method can be evicted at law, ſhould not be taken away by the meſne incumbrancers in a court of equity; unleſs ſuch perſons do equity, and pay the whole money due on both ſecurities.

Sir Ralph Bovey *v.* Shipwick. 1 Cha. Ca. 201. Supra. 181.

And therefore, where *D,* in 1651, made *B.* a ſecurity out of the manor and rectory of *W.* and, afterwards, in 1658, made *S.*

a ſecurity for money out of the rectory, only, (*S.* having no notice *then* of *B*'s ſecurity, which was for money alſo:) — and *S*, hearing afterwards of *B*'s ſecurity, bought in a mortgage, made to *D*, ſecured upon both the manor and rectory, which was precedent to *B*'s mortgage; the principal queſtion, in the caſe, was, whether, as the defendant's ſecurity was only out of the rectory, and the ſecurity he bought in was of both the manor and rectory, he ſhould make uſe of *D*'s ſecurity as to the manor, after *D*'s debt was ſatisfied by the profits of the manor and rectory; or, whether *B.* ſhould not then be admitted to enjoy the manor, his ſecurity being as well of the manor as of the rectory, and *S.* hold only the rectory till he was ſatisfied? And it was reſolved and ruled by *Finch*, Lord Keeper, againſt the opinions of *Wild* and *Twiſden*, Juſtices, that *S.* ſhould hold both the manor and rectory againſt *B.* until all due on both the ſecurities was paid him.

1 E. Ca. Abr. 323, 2.

So, where *R*, ſeized in fee, acknowledged a ſtatute of 1000*l.* to *I. S.* in 1663, and, on the 20th of *June*, 1665, mortgaged the manor of *A.* to the plaintiff's, *W.* and *K*, for 2000*l.* and, two days afterwards, mortgaged part of the ſame to the defendant *B.* and then died, leaving the defendant *H*, his heir; *B*, the ſecond mortgagee, agreed

Wyndham *et al. v.* Lord Richardſon *et al.* 2 Cha. Ca. 212. Supra. 180.

agreed with *M*, another defendant executor of *I. S*, to put the ſtatute in execution at his coſts, and to pay *M.* the debt, due on the ſtatute, after ſuch time as the ſtatute ſhould be extended and an aſſignment made thereof by *M.* to *B.* The ſtatute was extended in *Auguſt* 1672. The plaintiff's bill was that, on paying the debt on the ſtatute, it might be ſet aſide and aſſigned to them, and, for a decree againſt *H.* to pay or be foreclоſed of redemption. One queſtion was, whether the plaintiffs ſhould be admitted to ſet aſide the extent, on payment of what was due on the ſtatute without paying off the 2000 *l.* due on the ſecond mortgage to *B.* until the ſtatute was ſatisfied, not according to the juſtice of the debt in equity, but, according to the extended value. It was objected, that the defendant *B.* had not, in his mortgage made after the plaintiff's mortgage, all the lands mortgaged before to the plaintiffs, but only part thereof, and that the ſtatute covered the whole; and that, although the defendant *B.* might, by the purchaſe of the ſtatute, defend himſelf againſt the plaintiff, as to what was in his mortgage, yet, he could not, as to ſuch lands as were not therein. But the Chancellor was ſtrongly againſt the plaintiffs on this point, and a queſtion of fact ariſing, the caſe went off upon propoſitions.

And

And if a puiſne incumbrancer or purchaſor get in a ſatisfied judgment, or a prior ſtatute, or judgment, or recognizance, although it be paid off, yet, if he can make *uſe of it, at law*, equity will not interfere to hinder him.

Hardreſs 172.

Edmuns. Povey. 1 Vern. 187. 2 Ch. Ca. 208. Hard. 318. *Sed vid. Cont.*

So, where the plaintiff was a jointreſs, and the defendant a mortgagee ſubſequent, who had got an aſſignment of a ſtatute that was precedent to the jointure, but was ſatisfied, and extended it on the lands mortgaged; the bill was to ſet aſide the extent: but, the Maſter of the Rolls decreed, that it ſhould not be ſet aſide, but upon payment of principal, intereſt and coſts.

Sadler *v.* Buſh. 2 Vern. 30.

A prior incumbrance, ſatisfied at law, will protect a ſubſequent incumbrancer, in equity, although no conſideration were paid for it, or, if the conſideration were by way of exchange; becauſe, the having the deed, or an acquittance, is ſufficient for that purpoſe.

Churchil *v.* Grove. 1 Ch. Ca. 35. Sc. Infra. 1 Eq. Ca. Abr. 323. 3.

Thus, where the plaintiff lent *I. S.* 600*l.* on mortgage, and afterwards, diſcovering that the eſtate was pre-mortgaged to the defendant, got in an old ſatisfied term, and then brought his bill to compel the defendant to redeem or be foreclоſed; it was objected, that the plaintiff, in this caſe, (as between

Lord Chief Juſtice Holt. *v.* Mill. *et al.* 2 Vern. 279. Sc. 1 E. Ca. Abr. 323. 3.

between him and the defendant, who was a purchaſor) ought to have proved the actual lending and payment of the conſideration money for ſuch precedent incumbrance; and that the producing the deed, or an acquittance, was not ſufficient: but, the court held that this was not neceſſary.

2 Vern. 159. Siddon *v.* Charnell. Bunbury 298. Fag's caſe cited. 1 Vern. 52, 53.

The law is the ſame, although the incumbrance, ſet up as a protection, be obtained by fraudulent means; as, where one, being a purchaſor, came into a man's ſtudy, and there laid hand on a ſtatute that would have fallen on his eſtate and put it in his pocket; in that caſe, he having obtained an advantage at law, the court would not take it from him, though procured ſo unfairly and by ſo ill a practice.

But, where the prior incumbrance taken in is deficient in thoſe requiſites which are neceſſary to give it legal efficacy, no protection can be derived from it. As if a recognizance, bought in, hath not been inrolled in proper time.

And though the court may, on application, interpoſe, and, by their ſpecial order, ſupply the defect as to perſons who come *ſubſequent* to ſuch interpoſition; yet, it will not over-reach an intermediate incumbrancer.

Upon

Upon this principle, where a recognizance was inrolled by ſpecial order of the court, after the time for inrollment had elapſed, and it ſo happened that the plaintiff, between the date and the inrollment of the recognizance, lent money to the conuzor and took a judgment for his ſecurity which was over-reached by the recognizance, *that* being made good by the ſubſequent inrollment; the court, (the eſtate being in mortgage before, and the conuzor having only an equity of redemption in him, ſo that, neither the recognizance or mortgage could affect it without the aſſiſtance of the court;) inclined to give the preference to the judgment creditor.

Fothergill *v.* Kendrick. 2 Vern. 234.

So, if a judgment be not docketed within the time limited by the ſtatute 4th and 5th *William* and *Mary*, *c.* 20. it will not protect a *puiſne* incumbrancer, although the *eigne* incumbrancer hath actual notice of it at the time of making the mortgage.

Thus, where judgment was ſigned in *June* 1725, and a mortgage made to the plaintiff, who had notice of the judgment in 1728, but the judgment was not docketed, as appeared by an entry on the margin of the docket, until *January* 1730: the Maſter of the Rolls held, that the docket was not good, being made after the time limited

Forſhall *v.* Coles. 7 Vin. Abr. 54. P. C. 6. S. C. 2. E. Ca. Abr. 592. 8.

by the ſtatute, and that the mortgage had got the preference of the judgment by defect of the docket; and, as to the notice, it was not material, the ſtatute being expreſs, that judgments, not docketed, ſhould loſe their preference as to *purchaſors* and *mortgagees*.

But, this exception, as to judgments not docketed, is confined to caſes where they are ſet up againſt purchaſors or mortgagees, or heirs, or executors, or adminiſtrators in the adminiſtration, of the effects of thoſe of whom they are repreſentatives.

Robinſon *et al.* *v.* Harrington *et al.* Hil. Term. 1778.

And ſo it was held in the caſe of *Robinſon et al.* v. *Harrington*, which came before the court upon exceptions to the Maſter's report. The caſe appeared to be this; in 1739 the defendant gave a bond for 400 *l.* to *Sarah Green*, and, in Trinity Term 1744, the obligee brought an action againſt the defendant upon this bond, who pleaded the general iſſue; and the iſſue roll, upon which the ſame was entered, was regularly carried in of the term in which the iſſue was joined: but the cauſe was never tried, the parties being under an agreement to compromiſe the ſame; however the plaintiff entered continuance upon the roll regularly, by *non miſit breve*, till *Michelmas* Term 1745, when the defendant withdrew his plea and confeſſed judgment.

The

The Clerk of the judgments then entered up final judgment upon the iſſue roll, but never took any docket of the ſame to the clerk of the eſſoigns, which, according to the ſtatute 4 and 5 *W.* and *M.* 7, he ought to have done; when, therefore, the judgment creditor came before the Maſter, though the judgment appeared to be ſigned 29th *May* 1745, he poſtponed it to other judgments of 1748; becauſe Mrs. *Green's* judgment was not docketed with the clerk of the eſſoigns.

When the exception to the Maſter's report came on before the court, it was contended, on behalf of Mr. *Strafford* as the repreſentative of Mrs. *Green*, that the Maſter ought to have placed her judgment in priority according to the ſigning, and that the ſtatute of the 4th and 5th *W.* and *M.* made no alteration whatever in priority, as between judgment creditor and judgment creditor; for, the act only ſaid "that no "judgment, not docketed and entered up "in the books purſuant to the ſtatute, ſhould "affect any lands as to purchaſors or mort-"gagees, or have any preference againſt "heirs, executors or adminiſtrators in their "adminiſtration of their anceſtors, teſtator, "or inteſtates eſtates." This, therefore, was not a caſe within that act; for, the great object of the ſtatute of *W*, and *M*, as appeared moſt

moſt clearly by the preamble, was to enable purchaſors and mortgagees to find out ſuch judgments as affected the lands they were about to purchaſe or advance money upon, and likewiſe to give to heirs, executors, and adminiſtrators, an opportunity of enquiring what judgments were entered up againſt their anceſtors, teſtators, or inteſtates, ſo that they might apply their eſtates and effects in a due courſe of adminiſtration; that, at common law, judgments did not affect lands and tenements; but, by the ſtatute of *Weſtminſter* the 2d, the writ of *Elegit* was given, whereby a plaintiff might extend a moiety of the lands and tenements, of which the defendant was ſeized at the time of the judgment *recovered*; that however, as all judgments at common law were, by a fiction, ſuppoſed to be judgments of the firſt day of the term, there was no diſtinction reſpecting that matter until the time of *Cha.* 2d, when, it was enacted by the ſtatute of frauds and perjuries, "that "any judge or officer of any of his Ma- "jeſty's courts at *Weſtminſter* that ſhould "ſign any judgment, ſhould, at the ſigning "the ſame, without fee for doing the ſame, "ſet down the day of the month and year of "his ſo doing upon the paper book, docket, "or record which he ſhould ſign, which day "of the month and year ſhould be alſo enter- "ed upon the margin of the roll of the record, "where the ſaid judgment ſhould be entered."

And

And it was farther enacted, that ſuch judgments, as againſt purchaſors, *bona fide*, for a valuable conſideration, of lands, tenements and hereditaments to be charged thereby, ſhould, in conſideration of law, be judgments only from ſuch time as they ſhould be ſo ſigned; and ſhould not relate to the firſt day of the term whereof they were entered, or the day of the return of the original, or filing the bill, any law, uſage &c. to the contrary notwithſtanding.

But, though this act of parliament ſettled all difficulties reſpecting the fiction of law, whereby judgments were ſuppoſed to be all of the firſt day of the term; by compelling the party to ſet down the particular period when the judgment was ſigned, and declaring that, as againſt purchaſors *bona fide* for a valuable conſideration, the lands, tenements, and hereditaments to be charged thereby, ſhould be charged only from ſuch time as the judgment was ſigned; yet, in as much as it did not compel the plaintiff to carry in the judgment roll, purchaſors, and others, were rendered almoſt incapable of diſcovering what judgments were recovered. And therefore the ſtatute of 4 & 5 *Will. & Ma. c.* 20. to remedy that inconvenience, directed that all judgments ſhould be docketed, and entered with the particular officers of ſuch court;

and that, unleſs they were ſo docketed, they ſhould not affect any lands, or tenements as to purchaſors, or mortgagees; or have any preference againſt heirs, executors or adminiſtrators, in their adminiſtration of their anceſtors, teſtators or inteſtates eſtates. But, this did not take away the right which a judgment creditor had by the ſtatute of *Weſtminſter* to extend the lands of his debtor, it only laid him under particular reſtrictions in particular caſes, which Mr. *Strafford* did not come within the meaning of.

It was further contended and admitted, that, if Mr. *Strafford* had ſued out an *elegit*, and brought an ejectment to recover a moiety of the land of his debtor, he might have laid his demiſe on the day on which the judgment was recovered; which plainly proved that the lands were affected from the time of the judgment recovered, and not from the time of the docketing. For, if there had been two judgment creditors of the ſame day, one docketed and the other not docketed, and the undocketed creditor had got poſſeſſion, by virtue of an *elegit*, the docketed judgment creditor could not ouſt, or eject him from the poſſeſſion, till his debt had been fully ſatisfied out of the rents and profits; which was agreed to by the court; and Mr. *Strafford* ordered to ſtand

in priority, according to the ſigning of his judgment, and his exception allowed.

A *puiſne* mortgagee cannot be deprived of the benefit of a prior judgment, bought in, by a releaſe ſurreptitiouſly procured, by the intermediate incumbrancer.

Thus, where a *meſne* mortgagee, having notice that a *puiſne* incumbrancer had bought up a ſtatute precedent to his mortgage, the conuſee of which was dead, *took out letters of adminiſtration de bonis non* to the conuſee of the firſt ſtatute, in order to releaſe it, and procured the officer of the petty bag to vacate the ſame; the court would not ſuffer him to profit thereby; but, decreed, that the *puiſne* mortgagee ſhould be reſtored, and put in the ſame plight, as if the ſtatute had been ſtill in force, and ſhould go to an account upon it; and, if it were already ſatisfied, or the *meſne* mortgagee would pay what remained due thereupon, then he ſhould be let in.

Earl of Huntingdon *v.* Grenville. 1 Vern. 49.

The advantage to be derived from getting in a precedent judgment, depends upon the different procedure of the courts of law and equity, in inveſtigating the account on an extent; for, although lands are generally extended at much leſs than their true value, yet, at common law, the conuſor, or he

2 Vent. 338. 3 Akt. 518.

that claims under him, hath no relief but
4 Co. 69. b. by bringing a *ſcire facias ad computand*, in which the conuſee does not account according to the true value, but according to the *extended value*, and for the whole ſtatute. Whereas, in this caſe, on a ſuit in a court of equity, the conuſor may bring the conuſee to account for what he hath *actually* received; and ſhall recover all above the debt, the payment of that being all he is in equity intitled unto.

But, where the aſſignee of the ſtatute extended, is alſo mortgagee, and, conſequently, a creditor for a farther ſum, *there*, he hath equal equity on his ſide to retain the lands until he be ſatisfied, both for the ſtatute and the mortgage; therefore he will not be brought to account for what he hath received, *above* the ſtatute debt, on the extended value, unleſs he hath received enough to ſatisfy his mortgage alſo. Conſequently, if a *meſne* mortgagee would take off a ſtatute in the hands of a *puiſne* mortgagee, by a ſuit in equity, the account muſt be, as at law, upon the extended value for what is due on the ſtatute, and damages.

And, in ſuch caſe, where a ſtatute, recognizance, or judgment is taken in by a
The Earl of Huntingdon *v.* Grenville. 1 Vern. 52. Supra. 195. mortgagee to defend a ſubſequent incumbrance; he will be no further or longer protected

tected by it, than until he hath received ſo much of the profits as will ſatisfy the original ſecurity, on the extended value: for *then*, it will be avoidable by a *ſcire facias ad computandum*, or, by an account to be taken in the court of chancery.

Here we muſt obſerve the diſtinction between the preceding caſes, and caſes where a judgment creditor, or creditor by ſtatute, or recognizance, buys in a firſt mortgage; for, he cannot tack or unite this to his judgment &c. ſo as to gain a preference thereby, becauſe, ſuch creditor cannot be called a purchaſor, nor hath he any right to the land; he hath neither *jus in re* nor *ad rem*, and therefore, though he releaſe all his right to the land, he may extend it afterwards. All that he hath, by the judgment, is a lien upon the land; but, it is not certain whether he ever will make uſe thereof; for, he may recover the debt out of the goods of the conuſor by *ſcire facias*, or may take the body, and then, during the defendant's life, he can have no other execution. Beſides, the judgment creditor doth not lend his money upon the immediate view or contemplation of the conuſor's real eſtate; for lands, afterwards purchaſed, may be extended upon the judgment; nor is he deceived or defrauded, although the conuſor of the judgment hath before

Brace *v.* dutcheſs of Marlborough. 2 Will. Rep. 491. 2 Vez. 662. Wright *v.* Pilling. Gilb. Rep. Eq. 151.

mortgaged his real eſtate, as is the caſe of a mortgagee, if the mortgagor hath before mortgaged his land to another.

Stephenſon v. Hayward. Pre. Ch. 310.

Thus, where *B.* made a mortgage of his eſtate, and afterwards became indebted to *H.* 60 *l.* and then conveyed to *S.* in truſt, in the firſt place, to pay a debt due to himſelf, and ſubjected thereto, all *B*'s other debts in average. Then *S.* tendered the money to the mortgagee, which the mortgagee refuſed, and afterwards he aſſigned the mortgage to *H.* Then *H.* obtained judgment againſt *B.* on his bond for the 60 *l*, after which, *S.* ſold to the plaintiffs, who, not having paid their purchaſe-money, preferred their bill againſt the mortgagees and *H.* to redeem: and it was decreed that the plaintiffs ſhould redeem *H*'s mortgage, and that the judgment ſhould be paid but in proportion; for, though *H.* had a title at law, and it was inſiſted that this judgment would affect the reſulting equity in *B.* if there was more than ſufficient to pay his debts, yet, the conveyance made for the payment of debts being a good conveyance, and prior to the judgment; *that*, being ſubſequent, could not affect the eſtate.

Breerton v. Jones. 1 Eq. Ca. Abr. 325. 10.

So, where *A.* mortgaged his eſtate to *B.* and then aſſigned the equity of redemption to *C:* afterwards *D.* obtained a judgment againſt

againſt *A.* and procured an aſſignment of *B*'s mortgage; then *C.* tendered the money due on the firſt mortgage to *D.* who had notice of the aſſignment of the equity of redemption, at the time of his purchaſing in the firſt mortgage. It was objected, that *D*, having the legal eſtate in him by the aſſignment of the forfeited mortgage, and *C*, having only an equitable intereſt, not ſupported by the legal eſtate, he ought to pay both monies to *D.* but, the court reſolved that *C.* ſhould redeem, paying only the money due on the mortgage.

There is indeed a caſe, in which the court may be thought to have infringed upon this rule, which was, where *A*, the plaintiff, had lent money on ſeveral notes of different dates, each of them in words to this effect; "Received of *A. l.*— to be ſecured on mortgage of my *Stoke-hall* eſtate;" and the drawer had, previouſly to his drawing theſe notes, made a mortgage of this eſtate to the defendant. *A.* to cover the ſums lent on the notes, bought in a mortgage which was made prior to the defendants: and Lord *Hardwicke* was of opinion, that *A.* ſhould thereby protect himſelf againſt the defenddant's mortgage; and ſhould be paid the money lent upon the notes, as well as what was due to him upon the aſſignment of the firſt mortgage.

Matthew *v.* Cartwright. 2 Atk. 347.

But, it appears to me, that this caſe is clearly diſtinguiſhable from the common one of a creditor by judgment, or ſtatute, purchaſing in a prior incumbrance to protect himſelf, which, as hath been ſaid, he will not be permitted to do; for, theſe memorandums ſeem to fall, more properly, under the deſcription of agreements for ſecuring the money lent by mortgage, than of notes for the payment thereof; and, conſequently, the court, conſidering *that* as done, which, upon a bill to compel a ſpecific performance of theſe agreements, they would have directed to *be* done, looked upon this caſe, as not diſtinguiſhable from the ordinary caſe, of a *puiſne* mortgagee purchaſing in a prior incumbrance to protect himſelf.

So, a ſtatute, extended, may, notwithſtanding this rule, be made uſe of to protect the conuſee, as to a further ſum lent by him, againſt a mortgage, or ſecurity, taken by a *meſne* incumbrancer; for, the conuſee being intitled, at law, to hold the eſtate until he be ſatisfied his original debt at the extended value, the court will not interpoſe to take it from him, when he hath a further demand: for, *that* gives him an equity to retain it againſt the *meſne* mortgagee, which the latter cannot over-reach, but, on gaining a greater equity to himſelf, by diſcharging both debts.

Thus,

Thus, where a man acknowledged a ſtatute in the penal ſum of 1500 *l.* for payment of 800 *l.* with intereſt; and then, it being forfeited, and the lands extended thereupon at a certain annual value, ſettled the ſame lands in tail, for a good and valuable conſideration; afterwards he borrowed more money of the conuſee, articles having been firſt drawn between them, whereby it was agreed that, the ſtatute and extent ſhould ſtand as a ſecurity for the further ſum borrowed. The conuſor being dead, and the principal ſum of 800 *l.* with intereſt ſatisfied by perception of profits or otherwiſe, the plaintiff, tenant in tail under the ſettlement, filed his bill to account at the real value; but it was held by Chief Baron *Hale*, and all the court, that no relief could be given againſt the penalty of the ſtatute, the equity being equal, and the law on the ſide of the defendant.

Sir John Kedworth *v.* Joſias Primate. Hard. 318.

A prior mortgage purchaſed in, will be no protection to a *puiſne* mortgagee, unleſs it be forfeited; for, until then, the eſtate remains, as it was at common law, redeemable upon performance of the condition ſtipulated.

Hitchock *et al.* *v.* Sedgwick *et al.* 2 Vern. 156.

And a *puiſne* mortgagee, who purchaſeth in a prior ſecurity to protect his own, ſhall not only hold it until he be paid his debt, and

Darcy *v.* Hale. 1 Vern. 49.

and reimburſed the money advanced by him to purchaſe it; but, until he hath received all the money, and arrears of intereſt, due on the ſecurity bought in, as well as upon his own.

Goddard *v.* Camplin. 1 Ch. Ca. 119.

And, as a *puiſne* mortgagee may tack a prior incumbrance, that brings with it the legal eſtate, to his own, and thereby protect himſelf againſt intervening charges thereon; ſo, a mortgagee *eigne*, having the legal eſtate, may tack a ſubſequent ſum, advanced by him upon the former ſecurity, to his prior mortgage, and, thereby, protect himſelf againſt *meſne* incumbrances.

Blackſtone *v.* Moreland. 2 Ch. Ca. 20.

Thus, where *A.* had an annuity charged on the manor of *S.* and *B.* an eſtate therein liable to the annuity, and *C.* an intereſt ſubſequent to both by mortgage; *B*, having no notice of *C*'s intereſt, treated with him in the reverſion in fee, who deſired to borrow money of him, and, thereupon, purchaſed *A*'s intereſt, and for that, and by way of money lent to the reverſioner, paid 900 *l*, but there was no more than 500 *l.* due to *A: C.* exhibited his bill againſt *A.* and *B.* to redeem them on payment of their debts, and the queſtion was, whether *C.* ſhould pay *B.* any more than the mortgage money he had originally lent, and the 500 *l.* paid by him, which was due

to

to *A?* And it was decreed, that he ſhould pay the whole 900 *l.* advanced.

So, if there be firſt and ſecond mortgagee, and the firſt lend money after the laſt mortgage made, taking a *judgment* as ſecurity, he may tack this to his mortgage to protect himſelf againſt the ſecond mortgagee; for, he hath the legal eſtate and the judgment, *which*, though it paſſeth no intereſt, preſently, in the land, operates as a *lien* thereon.

Shepperd *v.* Titley. 2 Atk. 352. 4th reſolution in Brace *v.* dutcheſs of Marlborough 2 Will. 494. 2 Vez. 662. Supra. 197.

But, if one who hath a firſt mortgage, purchaſe in a ſubſequent judgment, without the conſent of the mortgagor, a *meſne* mortgagee, or aſſignee of the equity of redemption, will not be obliged to pay the money due on both ſecurities, in order to redeem; for, ſuch tranſaction of the mortgagee tended only to load the eſtate, without the conſent of the owner, where he had no proſpect of bettering his own ſecurity.

Breerton *v.* Jones. 1 E. Ca. Abr. 326. 11. Supra. 198.

And, if the firſt mortgagee hath notice of the intervening incumbrance, at the time of his lending more money upon a judgment or otherwiſe, he will not be permitted to tack them together againſt the *meſne* mortgagee.

Thus

Caſon *et al.* *v.* Round *et al.* Prec. Ch. 226.

Thus, where *K.* having a prior mortgage of certain lands, whereof *C.* had a mortgage ſubſequent, lent a further ſum to the mortgagor, on a ſtatute; *C.* alledged that *K.* had notice of his mortgage, before the laſt money lent: *K.* by his anſwer, did not deny notice poſitively, but evaſively; and *C.* could not prove notice, until after the lending the laſt money: yet, becauſe *K.* had not denied notice poſitively, the court decreed a redemption, on payment of the firſt money only,

3 Atk. 238. 2 Ca. Ch. 35. 1 Ch. Ca. 119.

And the law is the ſame in caſe of purchaſing in prior ſecurities, to protect ſubſequent incumbrances; it will not avail the purchaſor, if he had notice of the *meſne* incumbrance, at the time he advanced his money, on ſuch ſubſequent ſecurity: for, it is the purchaſing, without notice, that gives him equal equity with the *meſne* incumbrancer; and, if a man will purchaſe with notice of another's right, his giving a valuable conſideration will not avail him; for, he throws away his money voluntarily, and of his own free will.

1 Eq. Ca. Abr. 320, 1.

It ſeems, however, this rule reſpecting notice, admits of an exception, where a man firſt mortgages land by a defective conveyance, and afterwards, to a ſecond perſon, by an aſſurance that is good and effectual, with notice

notice of the former; for, in this caſe, the ſecond ſhall prevail notwithſtanding; becauſe the legal title is, *ab initio*, in him, and equity will not interpoſe to wreſt it from him, where both are equally upon a valuable conſideration.

Oſwick *et al.* *v.* Plumer *et al.* Paſch. 1708. 3 Bac. Abr. 644.

Thus, where *Richard Wiſeman*, ſon and heir apparent of Sir *Richard Wiſeman*, intermarried with *Winifred Barrington*, intitled to a portion of 4000*l*, and brought a bill againſt his wife's truſtees; whereupon a decree was had to pay him his wife's fortune, upon making a competent ſettlement; or, upon failure thereof, the fortune to be inveſted in lands by the approbation of the Maſter. And, upon the Maſter's report, that no competent ſettlement could be made by *Richard* the ſon, it was, by choice of parties, inveſted, in lands of Sir *Richard*, the father, of equal value; part of which lands happened to be eight acres of copyhold, which, in the ſettlement, were limited and declared, apart from the freehold, to be to the uſe of the iſſue of the marriage in common form, and afterwards in fee to the ſon, with a covenant from Sir *Richard* to ſurrender the copyhold. The wife died without iſſue, and the ſon mortgaged both copyhold and freehold together, for a valuable conſideration, to *Oſwick* and others plaintiffs, but without any ſurrender. The

ſon

ſon died, and the lands deſcended to *Elizabeth*, his ſiſter, and heir at law; then the mortgagees forecloſed *Elizabeth*, by a decree of the court, and entered and took poſſeſſion; to whom, being in poſſeſſion, *Elizabeth* releaſed and confirmed the eſtate in fee. Afterwards, Sir *Richard*, the father, having been out of poſſeſſion of the premiſſes, from the time of the ſettlement, which was made thirteen years before, *ſurrendered the copyhold land to the defendant Plumer, for a valuable conſideration. Plumer* was admitted, and brought his ejectment; and the mortgagees brought their bills to be relieved, which were diſmiſſed by the Maſter of the Rolls, on ſolemn argument, with coſts; for that the court would not ſupply the defect of a ſurrender, againſt a perſon that came in by title upon ſurrender of the ſame premiſſes; which decree was, on rehearing, confirmed by Lord *Cowper*.

Burgh *v.* Francis. 3 Bac. Abr. 643. 1 Eq. Ca. Abr. 320, 1. 2 Will. Rep. 491.

We muſt here remark a diſtinction that hath been taken between the preceding caſe, and caſes where the ſubſequent creditors have demands; which, although they are liens upon, yet, are not conſidered as ſpecificially charging the lands; as equity will inforce a defective conveyance, againſt claimants of the latter deſcription: for, as they did not originally take the lands for their ſecurity, and come in under the very perſon

that

that is obliged in conſcience to make the defective ſecurity good, they are conſidered as ſtanding in his place, and will, therefore, be poſtponed, until ſuch defective ſecurity be ſatisfied.

Upon this principle Lord *Cowper*, in a caſe, where *A.* ſurrendered his copyhold, by way of mortgage for money lent, and the ſurrender was not preſented at the next court, according to the cuſtom of the manor; and then *A.* became a bankrupt, and the aſſignees were admitted, and brought their ejectment; and the ſurrenderee of the copyhold brought his bill, in equity, to be relieved, decreed a perpetual injunction in behalf of the ſurrenderee: and, although it was urged that the creditors of the bankruptcy, were equally upon valuable conſiderations, as the ſurrenderee, and, having the title at law, ought to be preferred, yet, that argument was over-ruled; becauſe, the other creditors of the bankrupt, did not lend on the credit of the land, as the mortgagee did; and therefore, where ſuch creditors came, *under* the bankrupt, to charge the lands, they ought to ſtand in his place, and come under the ſame obligation of conſcience to make good the defective ſecurity.

Taylor *v.* Wheeler. 2 Vern. 564. 2 Salk. 449. 3 Bacon. Abr. 644.

And

And the reaſon of this difference is, that, where there are two perſons, that have equal equity (as was the caſe in *Oſwick* and *Plumer*, both being equally purchaſors of the ſame property, for a valuable conſideration) there, thoſe that have the legal title ſhall prevail; becauſe, there is no equity, to take from ſuch perſon the title that he hath gained at law; but, if the contending parties in equity have not equal equity, (as was the caſe in *Taylor* v. *Wheeler*, becauſe the one creditor had intended to ſecure himſelf by the mortgage of the copyhold, whereas the other creditors had truſted merely to the bankrupt's perſonal ſecurity, and, conſequently, had not equal equity to have the land applied for the payment of their debts, as the former, who looked to that in particular) thoſe that have the greateſt equity, ſhall be relieved againſt the legal title.

Alſo, if a clauſe be contained in the firſt mortgage-deed, making it a ſecurity for further ſums borrowed, ſubſequent loans will have relation to, and be taken as part of, the original tranſaction; and they muſt be paid before a ſecond mortgage intervening, although the firſt mortgagee had notice of it, at the time of advancing more money, *if*, the ſecond mortgagee had notice of the clauſe, in the firſt mortgage.

Thus

Thus, where *A.* mortgaged his eſtates to *B.* for a term of years to ſecure a ſum of money already lent to *A.* and alſo all ſuch other ſums as ſhould thereafter be lent or advanced to him: *A.* made a ſecond mortgage to *C.* for a certain ſum, *with notice of the firſt mortgage*, and then the firſt mortgagee, *having notice of the ſecond mortgage*, lent a further ſum. Lord *Cowper* decreed that the ſecond mortgagee ſhould not redeem the firſt mortgagee, without paying as well the money lent after, as that lent before the ſecond mortgage was made; for, it was the folly of the ſecond mortgagee, *with notice*, to take ſuch ſecurity.

Gordon *v.* Graham. 7 Vol. Vin. Abr. 52. pl. 3.

But, here we muſt particularly attend to the diſtinction, between notice previous to the time of the lending the money by the *puiſne* mortgagee, and at the time of purchaſing in the elder incumbrance; for, a mortgagee *puiſne* will be protected, although he had actual notice of a ſecond incumbrance at the time of purchaſing in the *prior ſecurity* to cover his own, becauſe, that is the very occaſion that ſhews the neceſſity of ſo doing.

1 Vern. 188. 2 Vent. 339. 2 Vez. 574.

This rule however hath its exceptions; for, a purchaſor or mortgagee ſhall not protect himſelf by taking a conveyance from a truſtee, if he hath notice of the

Pye *v.* George. Salk. 680. Rep. temp. Talbot 260.

truſt *at the time of getting it in.* And therefore, where *B*, being poſſeſſed of a term for years, had made a voluntary ſettlement thereof in truſt for herſelf for life, remainder to *I.* her daughter for life, remainder to the children of her daughter by her then huſband; and *I.* afterwards mortgaged the lands in queſtion to *S.* who pretended he had no notice of the ſettlement, *I.* in the mortgage-deed being called the daughter and heir of *B*; but, that afterwards, hearing of it, he got an aſſignment of the term from the truſtees. The court reſolved that, although a purchaſor might buy in an incumbrance, or lay hold of any plank to defend himſelf, yet, he ſhould not be protected by taking a conveyance from a truſtee, after he had notice of the truſt; for, in that caſe, he himſelf *became the truſtee*, and muſt not, to ſave himſelf, be guilty of a breach of truſt.

Saunders *v.* Dehew. 2 Vern. 271.

Even a fine levied by a purchaſor, for full conſideration *with notice of a truſt*, to ſtrengthen his eſtate, will not bind the *ceſtui que truſt*, although there be five years non-claim; for he, having purchaſed with notice, is but a truſtee, notwithſtanding any conſideration paid by him; and the eſtate not being diſplaced, the fine cannot bar: but a fine and non-claim will be

Cited. Bovey *v.* Smith. 1 Vern. 149. 2 Ch. Ca. 125.

be a bar in equity, if a purchaſor hath not notice.

And where the plaintiff's bill, was to be relieved upon a truſt, and charged the defendant with notice thereof, and that he had procured a conveyance of the lands upon which the truſt was had, *and that at, or before, his taking the ſaid conveyance*, he had notice of the ſaid truſt for the plaintiff; the defendant, by way of anſwer, denied that he had any notice of the truſt *at the time of his purchaſe or contract*, and pleaded that he was a purchaſor for a valuable conſideration. And it was inſiſted that, the point of notice was not well anſwered, in that the defendant denied notice *at the time of the purchaſe only*; for, the word purchaſe might be underſtood to mean the time when the contract for the purchaſe was made, and it might be, he had no notice then, and might have notice after, before, or at, ſealing of the conveyance; and if there was any notice before the conveyance to him was executed, that would charge the defendant: upon which objection the plea was over-ruled.

More *v.* Mayhow. 1 Ch. Ca. 34. Attorney General *v.* Gower *et al.* 2 E. Ca. Abr. 685. 11.

But here we muſt obſerve that, if *ceſtui que truſt*, tenant in tail, be the mortgagor, and joins with the truſtees in making the conveyance, it will be good and valid;

Elie *v.* Oſborne. 2 Vern. 754. 1 Eq. Ca. Abr. 385, 3.

they being conſidered as truſtees purely for the tenant in tail to preſerve his eſtate *only*, and not to ſtand in oppoſition to him, for the ſake of thoſe who are to come after him.

2 Ch. Ca. 48.
2 Vez. 477.

So, if the *eigne* incumbrance be purchaſed in after a decree *in rem* by a creditor, party to that decree, it will not protect him, although he had not notice of any prior incumbrance at the time he lent his money, as, in this caſe, notice or not is immaterial: for, the decree binds the purchaſor, and the vendor can give no title, when the right to the land is adjudged to another, and the party who gaineth the ſuit, hath a title, by the decree, to carry it into execution on the land, into whoſe-ever hands it may afterwards come.

Wortley v. Birkhead.
2 Vez. 571.
Sc. 3. Atk. 809.
2 Vern. 525.

Thus, in the caſe of *Wortley* againſt *Birkhead*, where the plaintiff, (after a decree had been made, in 1748, in a cauſe wherein the plaintiff and defendants, among other creditors, were plaintiffs, for the ſale of the eſtate of *A.* whereby the Maſter had been directed to inquire into the priority of their demands,) bought in a judgment given in 1694, and made claim before the Maſter, to have it tacked to his mortgage and thereby to be paid before the defendants; as to which the Maſter refuſed to make any report:

port: whereupon the plaintiff filed his bill, and one queſtion was, whether he could tack the incumbrance bought in after the decree to his mortgage? Lord Chancellor *Hardwicke*, as to this part of the caſe, ſaid, that there was no caſe wherein it had been determined that a *puiſne* incumbrancer, a party in a cauſe, and a decree made, in that cauſe, for ſatisfaction of incumbrancers according to their reſpective priorities, having taken in a prior to tack to his *puiſne* incumbrance, ſhould be allowed to make uſe of it in any other ſhape, than that in which the original incumbrancer might uſe it, had no ſuch purchaſe been made. He thought it would be moſt miſchievous and pernicious, if the court ſhould allow the doctrine of tacking to be carried to that extent; firſt, taking it upon the terms of the decree; all thoſe decrees, where there were ſeveral incumbrances before the court, a ſale directed, and every thing neceſſary done to clear the eſtate, in order to that ſale, proceeded on the foundation, *that the rights of the parties* were to be taken as they ſtood at the time of the decree; and therefore they directed an inquiry into the priorities. What then were thoſe priorities? Why ſuch as they ſtood at the time of the decree: not that, afterwards, the priority ſhould be varied; the ſenſe, reaſon, and juſtice of the caſe required it

ſhould be ſo, for, otherwiſe, if (where an incumbrancer, on an eſtate which was affected with ſeveral charges, brought a bill for ſatisfaction thereof, and there were all proper parties and a decree for it, as between himſelf and the owner of the equity of redemption, ſome of the incumbrances being prior, others poſterior to his,) one of thoſe defendants, who happened to be prior to him, was allowed to convey to another defendant, who was *puiſne* to him, it would ſhut out the plaintiff after the decree made, at which time the rights were conſidered. What would be the conſequence? Nothing could lay a foundation for greater colluſion and contrivance, between the parties, to exclude each other, than ſuch a liberty would, and that to the great deceit of the plaintiff; for, then, a man would loſe his coſts by ſuch a proceeding, although he had a right to his debt, principal, intereſt and coſts, according to the reſpective priorities; that was the direction of this decree: and there was a ſufficient fund, according to the, then, right of the plaintiff, to pay all that was due; but if this were permitted, after a decree was made, two of theſe defendants might, by a colluſion, give a third incumbrancer more than his debt, and it would be worth while to do ſo, in order to exclude another, who happened to be a ſecond incumbrancer. It would be

carrying

carrying ſecurities to market in that manner, whereby the purchaſer of them ſhould not only ſtand in the place of the party ſelling, but, would acquire a new equity, which it would be miſchievous to allow; and therefore his Lordſhip ſaid, he never was clearer in opinion than upon this part of the caſe, as to the general right.

And the law is the ſame as to purchaſors, incumbrancers who are not parties in the ſuit, *but who would come in under the decree*; for they muſt come in upon, and ſubmit to, the terms of that decree, though no parties. 2 Vez. 575.

So where *S*, a *puiſne* incumbrancer, after the bill brought, and after the firſt decree made, and, in truth, after the report, got an aſſignment of an old judgment and mortgage, expecting thereby to gain a preference to his debt; the court held that, the aſſignment obtained by him being after the decree made, he ſhould not profit by it or change the order of payment, but ſhould come in according to the time of his own incumbrance, without regard to the old judgment and mortgage. Briſtol *et al.* *v.* Hungerford *et al.* 2 Vern. 524. 5.

Upon the ſame principle, a ſuit pending in equity, againſt the *land*, is ſuch a *lis pendens*, as will have the like conſequences

as to a ſubſequent purchaſor of a prior title to protect himſelf; for, the commencement of a ſuit, *in rem*, is conſidered, in equity, as analogous to the iſſuing out of the original proceſs in a real action, which attached upon the land, and bound it: and no ſubſequent alienation of the property could elude it's operation when purſued to judgment: for *pendente lite nihil innovetur*: therefore the vendor of lands, pending a ſuit in equity againſt them, can give no title but what will be ſubject to the iſſue thereof; for, the ſuit having attached upon the land, the right depends upon the event thereof, which will give a title to him, in whoſe favour the decree is made, that may be carried into execution, thereon, againſt all perſons holding the ſame.

Finch v. Newnham. 2 Vern. 217.

Thus where *J F*, having only one daughter and deſiring to keep part of his eſtate in his name, by will, made in 1684, deviſed a meſſuage to *F.* his near kinſman in tail male with remainder over, and gave his lands in *Suſſex* to his daughter who married *D*, they, with *C*, were ſuppoſed to have deſtroyed the will after the death of the teſtator. *F.* brought his bill againſt *D.* and his wife, and, in 1687, obtained a decree to hold and enjoy the lands according to the will, againſt them and all claiming under them.

The

The eſtate, deviſed to *F*, having been mortgaged by the teſtator prior to his will to *B*. for 100 *l*. *N*. pending the ſuit, bought in *B*'s mortgage and purchaſed the equity of redemption from *D*. and his wife. *N*. was ſerved with the former decree, and appeared, and was examined, and ſet out his title under this mortgage, whereupon *F*. was put to bring his bill to redeem. *N*. by anſwer alledged that, although he had been informed before his purchaſe that it was pretended there had been ſuch will made, yet, upon enquiry, he had been aſſured and ſatisfied that it was deſtroyed by the teſtator in his life time, and therefore he proceeded in his purchaſe; and inſiſted, that the former decree, to which he was no party, was unjuſt in decreeing the lands to be enjoyed according to the will: but, in regard he purchaſed *pendente lite* and with notice that there was a will, the court would not admit him to examine the juſtice of the former decree, or to try at law whether ſuch will was cancelled or deſtroyed by the teſtator, but declared he ſhould be bound by the former proceedings, and decreed the redemption of the mortgage to the plaintiff.

But, in caſe of a real purchaſor for a valuable conſideration, *pendente lite*, the plaintiff

plaintiff will be held to ſtrict proof of his own title.

Sorrell *v.* Carpenter. 2 Will. Rep. 482.

Thus, where a bill was brought by *S.* againſt *C.* to have the benefit of a decree, obtained againſt *L*, for the recovery of a leaſehold eſtate held of the dean and chapter of *Saint Pauls*; *C.* being a purchaſor of this eſtate from *L. pendente lite*, but as was proved, for the full value, and without any notice of *S*'s claim, or any actual notice of the ſuit: for the plaintiff it was inſiſted, that this purchaſe made, *pendente lite* was to be conſidered as made under an implied and conſtructive notice; but, the court ſaid that although, where there was a conveyance made, *pendente lite*, without any valuable conſideration, and to avoid and elude a decree, it ought to be highly diſcountenanced; and, though the alienation were for ever ſo good a conſideration, the purchaſe, if made *pendente lite*, was nevertheleſs to be ſet aſide; yet, where there was a real and fair purchaſer, without notice, it was a very hard caſe, eſpecially in a court of equity; and, there being ſome defect in part of the proof in deraigning the title of *S*, leave to amend, or make any new proof, after publication, was refuſed, and the bill diſmiſſed.

Ibid.

In this caſe the Chancellor obſerved, that it was a difficult matter to ſearch for

bills in equity, or to get notice of them; many ſuch being, after filing, kept in the Six Clerks deſk: and, that though the court would oblige all perſons to take notice of it's decrees as much as of judgments at law, yet, there did not ſeem to be the ſame reaſon for obliging people to take notice of the filing of a bill.

And if a purchaſe or mortgage be made, pending a bill, to perpetuate the teſtimony of witneſſes to a will of land, the proceedings may be read againſt a purchaſer or mortgagee, during the ſuit, although he hath not notice either expreſs, or implied.

This rule is founded upon the neceſſity of the caſe; for, if depoſitions, taken in ſuch a ſuit, could not be read againſt a purchaſer under the heir at law or deviſee, it would be in their power to prevent ſuch a bill from being of any effect. For inſtance; ſuppoſe an heir at law, (having got into the poſſeſſion of an eſtate on the death of his anceſtor, and the deviſee, being out of poſſeſſion, brought a bill to perpetuate teſtimony, and to prove the will,) pending the ſuit, made a ſecret conveyance to another perſon; if the depoſitions taken in the cauſe, could not be read againſt the perſon who claimed under the heir at law, the whole object of the ſuit would be defeated.

The

The caſe would be juſt the ſame, in reſpect to its conſequences, if a deviſee, having got into poſſeſſion, the heir brought a bill of this ſort and afterwards the deviſee made a private conveyance: if the heir at law could not read the depoſitions which were taken in that cauſe againſt a party claiming under him, the bringing the bill would be of no manner of effect.

Garth *v.* Crawford. Barnardiſton Rep. 450. Sc. By name of Garth *v.* Ward. 2 Atk. 175.

Accordingly, in a caſe where *J.* made her will, and thereby deviſed all her real and perſonal eſtate to *C.* and *N.* in truſt, that they ſhould ſell the ſame in order to diſcharge her debts and legacies; and that the ſurplus ſhould be diſtributed into three equal ſhares, one ſhare whereof was to go to *C.* another ſhare to *K.* and a third to *T.* Soon after the making the will *J.* died, leaving *G.* her heir at law: *P.* and *T.* were papiſts, but *C.* was a proteſtant. In *April*, 1736, *T.* mortgaged her intereſt in this eſtate to *W.* for 108 *l.* In *May*, 1736, a bill was brought, by *C*, *P*, and *T.* againſt *G.* the heir at law, in order to perpetuate the teſtimony of the plaintiffs witneſſes and to prove the will of *J.* On the 3d of *January*, 1737, *W.* purchaſed of *T.* her equity of redemption in this eſtate for 1000 *l.* On the 8th of *January* following, *G.* put in his anſwer to the bill, inſiſting thereby, among other things, that *P.* and *T.* were papiſts,

and

and conſequently incapable by the ſtatute of 11 *Will.* 3. to take by the will of *T.*

In that cauſe, *G.* examined ſeveral witneſſes, to ſhew that *P.* and *J.* were papiſts.

A bill was then brought by *G*, againſt *C. P.* and *T.* and likewiſe againſt *W*, in order to ſet aſide the will of *J.* with regard to two thirds of her real eſtate, which was to be ſold and the money ariſing from the ſale to be paid to *P.* and *T*, and, likewiſe, that *P. T.* and *W.* might account for the profits of thoſe ſhares. After the anſwers to this bill were come in, an order was obtained, that the depoſitions in the former cauſe might be read in the preſent one, ſaving juſt exceptions: but, on offering them to be read, it was objected on the part of *W.* that they could not be read as againſt him, he being no party to the former ſuit, his mortgage being made before the filing of that bill, and his purchaſe of the equity redemption having been before the anſwer of *G.* came in.

But, the Lord Chancellor was of opinion that theſe depoſitions ought to be read; and his Lordſhip diſtinguiſhed between the mortgage to *W.* and his purchaſe of the equity of redemption; for, as to the mortgage, which was ſtated to have been made before

before the filing of that bill, his Lordſhip was of opinion that none of the depoſitions taken in that cauſe could any ways be read to affect that; but, with regard to the purchaſe of the equity of redemption, which was made ſubſequent to the filing the bill, they ought to be read; and his Lordſhip ſaid, that the anſwers not coming in until after the equity of redemption purchaſed, made no difference, for it very often happened by the ordinary indulgences which were given to the putting in of anſwers, that an anſwer did not come in to a bill until long after it was filed.

Barnard Rep. 454. Sc. 2 E. Ca. Abr. 687. 13.

But, in general, a bill, that cannot be brought to a hearing, cannot properly create a *lis pendens*, ſo as to affect a purchaſer, claiming under one of the parties, after filing of the bill.

Searle *v.* Lund. 2 Vern. 88. 1 Eq. Abr. 332. 4. 2 Ch. Ca. 48.

And it ſeems, that a decree in a court of equity, for money, does not bind a purchaſor for a valuable conſideration, without notice thereof, any more than a judgment at law; for, though it be a lien upon the eſtate, it doth not attach ſpecifically upon the land. *Sed quær.*

So, a bill of diſcovery, depending, will not prevent *even* a party to the ſuit, from ſecuring himſelf, by purchaſing in an incumbrance prior to his own.

Thus

Thus, where *L*, the defendant in the cauſe, having an incumbrance, on the lands in queſtion, ſubſequent to the plaintiffs, and the bill being againſt him and other incumbrancers to diſcover their incumbrances, purchaſed of *W*. who was a defendant, had the firſt incumbrance, and aſſigned to *L. pendente lite*; the queſtion at the hearing was, whether the defendant *L*, who had a mortgage ſubſequent to the plaintiffs, ſhould help himſelf againſt him by buying in *W*'s incumbrance that was prior to both? It was reſolved he might lawfully do ſo: and the plaintiffs bill was diſmiſſed without coſts.

Hawkins *v.* Taylor *et al.* 2 Vern. 29.

Again, if a mortgagee, having had notice of incumbrances and having been tendered his money, afterwards procures a decree to foreclose, and then purchaſes the equity of redemption; ſuch incumbrances will not be affected by the decree.

Greſwold *v.* Marſham. Supra. 103.

But, if a mortgage be made and afterwards a commiſſion of bankrupty be taken out againſt the mortgagor, and the commiſſioners *make an aſſignment* of the eſtate; and then money be lent to the mortgagor on a ſecond mortgage, the mortgagee *having no actual notice* of the commiſſion, in ſuch caſe, although the *puiſne* mortgagee purchaſe in the firſt ſecurity, yet, it will not protect the

Hitchcock *v.* Sedgwick. 2 Vern. 156. Ca. temp. Talb. 70. Supra. 201.

the mortgage ſubſequent to the commiſſion of bankruptcy. The principal reaſon for which, I apprehend, is, that, at the time of making the ſecond mortgage, the bankrupt hath no eſtate upon which it can attach; and, conſequently, cannot convey ſuch an intereſt to the mortgagee as he may tack to the prior mortgage: for, by the aſſignment, the equity of redemption is *actually* diveſted out of the bankrupt and veſted in the aſſignees by force of the ſtatutes, for the *benefit of the creditors*; and, in this reſpect, the caſe appears to me to fall within the reaſon of the caſe of *Breerton* v. *Jones*, wherein it was held that, where a mortgage was made and then the equity of redemption aſſigned to a third perſon, a ſubſequent judgment could not attach thereupon.

1 Eq. Ca. Abr. 325. 10.
2 Vez. 662.
Supra. 198, 203.

Beſides, it ſeems as reaſonable, that a purchaſer ſhould be denied the benefit of protecting himſelf by the purchaſe of a prior incumbrance, after a commiſſion of bankruptcy ſued out, and before the aſſignment of the effects, as after a decree: for, a commiſſion of bankruptcy is a publick act of the court, and operates as a decree *in rem*; and, though an *ex parte* proceeding at firſt, yet, if it be not afterwards ſuperſeded, the property of the bankrupt is thereby determined to belong to his creditors in an

equal

equal proportion, according to their ſeveral demands; and it differs from an act of bankruptcy, which is of ſo ſecret a nature that it is impoſſible to be known, and, has no viſible operation until coupled with a commiſſion.

The two laſt caſes, which I have here ſtated, have been generally conceived to turn upon the principle, that a decree and a commiſſion of bankruptcy were of ſuch a nature as all the world were deemed, by a court of equity, to have notice of: but, in that point of view, it would be difficult to reconcile them with the caſes determined on decrees for money, and judgments on perſonal actions; for they are founded upon as high authority, are of equal notoriety, and yet, as hath been ſhewn, have not been deemed notice to purchaſers as to this purpoſe. 2 Vez. 477.

In all caſes of a plea of a purchaſe or marriage ſettlement, notice muſt be denied, though not charged by the bill; and it will be ſufficient to deny it, either by the plea or anſwer, notwithſtanding the objection that it ought to be in the plea, ſince all the defendant has to do, is to prove his plea; for he is not to prove a negative, *viz.* that he had no notice. However, it ſeems beſt to deny notice, both in plea and anſwer. 3 Will 244. in Notes.

Caſon *et al.* *v.* Round *et al.* Prec. Ch. 226. 2 Vent. 361. 2 Vez. 450. 2 Ch.Ca. 73.

Notice, if charged, muſt be poſitively denied in the anſwer; for, if it be only evaſively denied, the court will decree a redemption on payment of the money, only, which was originally lent.

Jones *v.* Thomas. 3 Will. 243.

But, in general, in a plea of a purchaſe, it is ſufficient denial of notice to ſay that, at the time of the purchaſe, he had no notice, without ſaying, or at any time before; for, notice before, is notice at the time of the purchaſe, and the party will, in ſuch caſe, on its being made appear, that he had notice before, be liable to be convicted of perjury.

Senhouſe *v.* Earle. 2 Vez. 450.

It is a rule of the court of chancery where the plaintiff charges not only notice in general, but alſo ſpecial facts and circumſtances, *that they* muſt be denied, as well as, notice in general.

1 Vez. 66.

If notice be denied by the anſwer, and proved by one witneſs only, the rule of the court is, not to admit it.

Ibid.

But this rule admits of a diſtinction; for, where the defendant's anſwer is a clear denial of a fact, which is proved only by one witneſs, the court will not decree againſt the anſwer. But, where it is not a poſitive denial of the *ſame fact*, but admits of

of a difference, (as, where it is only a denial with reſpect to the defendant himſelf, and *admits the fact as to another*, which will equally affect the defendant,) the court, on the evidence of one undoubted witneſs, will decree againſt the anſwer. Thus where one, *only* denies perſonal notice, which is a negative pregnant, that ſtill there *may be notice to his agent*, which is a fact equally material; the anſwer will not be good.

On pleading, that the defendant is an incumbrancer for a valuable conſideration without notice, it is ſufficient to alledge, that the purchaſe of the prior incumbrance was made for a valuable conſideration, without ſtating the particular ſum. 1 Ch. Ca. 34.

CAP. VIII.

Of Notice Expreſs and implied.

NOtice is of two kinds. Firſt, actual notice, as where a man is party to a deed, or has notice of it regularly ſerved upon him.

Secondly, preſumptive notice, which is a *concluſion* of law, where, by the exerciſe of common diligence, without any extraordinary precaution, a man cannot but acquire a knowledge of a fact; that he hath notice thereof, although no *actual* proof of notice be exhibited againſt him.

Brothers v. Bence. Fitz. Gib. Rep. 118. 2. E. Ca. Abr. 615. 11.

Thus, where *A*, a copyholder in fee, mortgaged to *J S*. who was admitted by *B*. the ſteward of the manor; and afterwards *A*. made a ſecond mortgage to *C*. who was alſo admitted by *B*; and then *a mortgage to B*. who bought in *J S*'s ſecurity; it was decreed, that *B*. ſhould not poſtpone *C*: becauſe it is preſumed, from the mere act of admiſſion, that a man of ordinary diligence and underſtanding, being ſteward of the manor, when

C. was admitted, muſt know, or have notice, of the *meſne* mortgage to *C.*

Where a purchaſor *cannot make out a title*, but by a *deed* which leads him to a fact material to it; he will not be deemed a purchaſor without notice of that fact, but will be preſumed cognizant thereof; for, it is deemed groſs neglect, that he ſought not after it.

2 Ch. Ca. 246. Gilb. Rep. Eq. 8.

Thus, where *B.* deviſed to *J.* in tail male, and if he died without iſſue male, to *Y.* in tail male, but ſubject to two legacies of 500*l*, and 1000*l*, to the Drapers Company; and *Y*, afterwards, levied a fine to the uſe of him, and his heirs, (on which was five years non-claim) and then granted a rent-charge of 100 *l per annum* to *S*, and mortgaged the premiſes to *L*; the court held the fine and non-claim was no bar to the legatees; for, *Y.* having no title, but under the will, it was implied notice to all purchaſers under him.

Drapers Company *v.* Yardly *et al.* 2 Vern. 662.

And ſubſequent purchaſors alſo are taken to have notice of the contents of a deed or will, if they muſt claim under it.

As, if *A.* makes a conveyance to *B.* with power of revocation by will, and, afterwards, limits other uſes; if *B.* diſpoſes thereof to

Moore *v.* Bennett. 2 Cha. Ca. 246.

a purchaſor, a ſubſequent purchaſor is intended to have notice of the will, as well as, of the power to revoke; for no title can be made to a purchaſor, but by the conveyance which contains the power of revocation.

Bovey *v.* Smith. 1 Vernon 144. Sc. 2. Ch. Ca. 124.

But, in the caſe of *Bovey* and *Smith*, a will was not ſuffered to be ſet up, as preſumptive notice to defeat a tranſaction, by a truſt therein contained that had lain dormant for many years, after a fine, and where there was *room to preſume*, that other truſts were appointed. In that caſe, *B*, the mother of *A*, being in *Holland* and having a ſeparate eſtate, about forty years previous to the time of filing the bill, made her will in *Dutch*, and thereby deviſed houſes to *W*, her huſband's ſon by a former wife, and to other truſtees, in truſt *for her four daughters and their children, and ſuch of their children as ſhould be alive at the laſt*, and, afterwards, declared the truſt of all her eſtate, thereby undiſpoſed of, to be for her and her heirs.

The truſtees, apprehending that the deviſe carried the inheritance of the houſes to the daughters, ſold ſuch inheritance in 1652, for a good and valuable conſideration, and diſtributed the money, ariſing from the ſale, equally amongſt them.

A.

A. was privy to this conveyance, and made no claim, nor pretended any right to the houſes; a fine was levied of them, and five years, afterwards, *W.* the truſtee, for a full conſideration, purchaſed them back to himſelf and his heirs. Then *A*, having taken advice on the will, and conceiving the daughters took only an eſtate for life, exhibited his bill againſt *S.* who now ſtood in the place of *W.* the truſtee, to have an execution of the truſt, and the lands decreed to him. Two decrees had been for the plaintiff.

One point argued, was, that is was impoſſible any one ſhould come at the land without having notice of the truſt, for they muſt purchaſe under the will; and all their title was by the will by which the truſt was created, and every man that had notice of the will, muſt, at his peril, take notice of the operation and conſtruction of the law upon it. But the Lord Keeper ſaid, this was an application, after one and thirty years poſſeſſion, to affect an eſtate with a truſt, notwithſtanding a releaſe and fine, and *that*, upon a ſuppoſal that *B.* had made no other appointment, (as ſhe had power to do by the deed) *and* which, after ſo long a poſſeſſion, it ought rather to be preſumed ſhe had done; and alſo upon a ſuppoſal, that this was a true copy of the will. This was only

a tranſlation; the original was loſt; the difference in point of traſlation between children and iſſue was nice, and the queſtion was, who ſhould ſuffer? For the defendant was a purchaſor and had paid a full conſider-tion, and was, here, to be affected with a notional notice only; the plaintiff ſtood bye all the while and was ſilent, and, at beſt, paſſive in the breach of truſt. That, therefore, though it was hard to diſmiſs the bill after two decrees for the plaintiff, yet his Lordſhip was not ſatisfied he could decree it for him, and the bill was diſmiſſed.

1 Vez. 173. So, likewiſe, this rule admits of an exception, in the caſe of an aſſignee of the eſtate of a teſtator, under an aſſignment made by the executor; for, he will not, in favour of creditors or reſiduary legatees, be preſumed to have notice of what is contained in the will of the deviſor; becauſe, whoever takes any thing from an executor, muſt always do it with notice of a will: and therefore, if this doctrine of the will being notice to the aſſignee was to prevail, no perſon would dare to purchaſe, or take an aſſignment from an executor. Beſides, it would be unreaſonable that a purchaſer ſhould take upon him to make out the account, as to the *quantum* of the debts or aſſets, when he is not intitled to have the vouchers for that purpoſe.

Thus

Mead *v.* L. Orrery. 3 Atk. 236. July 19. 1745.

Thus where *M*, having a mortgage of 3500 *l*, made his will in 1712, and deviſed all his real and perſonal eſtate, not by his will otherwiſe diſpoſed of, to his executors, in truſt, in the firſt place by charging, leaſing, or ſelling thereof, or of any part thereof, to raiſe money to pay his debts; and then to divide what ſhould remain, after payment thereof, in equal proportions between his five children, and appointed his wife, his eldeſt ſon *I M.* and another perſon executors, and died, leaving his widow and five children; and, after payment of all *M*'s debts, a large ſurplus remained to be divided. *I M.* having been appointed in 1726, receiver of all the rents and profits of the real and perſonal eſtates of *E*, procured a deed to be made, to which the other executors were parties, reciting, that there was due on the mortgage 9000 *l*, and that the ſame was the proper money of *I M*, and aſſigning the mortgage and all due thereon to *B*, his heirs, and aſſigns, with a proviſo to be void, if *I M.* faithfully accounted with *B.* for what he ſhould receive from the eſtate of *E*. *I M.* afterwards died inteſtate without accounting with *B.* and greatly indebted to the eſtate of *E*. A bill was then filed by the plaintiffs, two of the children of *M*, againſt the defendants, the repreſentatives of *E*, to account for what they had received

on

on the mortgage, and to deliver up the deeds and writings relating thereto; and one queſtion was, whether the plaintiffs, as reſiduary legatees of *M*, were intitled to be relieved againſt the aſſignment of the mortgage, and to have an account; or, whether the repreſentatives of *E*. were intitled to retain the aſſignment? And this turned upon the point, whether the aſſignees of the mortgage were to be conſidered as having notice of the truſt for the benefit of younger children? And the court held, the bare point of notice of the will, in this caſe, was not ſufficient.

Nugent *v.* Gifford. 1 Atk. 463. Nov. 13. 1738.

So, where an executor aſſigned over a mortgage term of his teſtator to *A*, as a ſatisfaction of a debt due to *A*, from himſelf; it was objected in favour of the daughters of the teſtator, who were creditors under a marriage ſettlement, that the aſſignee took this aſſignment with notice that it was the teſtamentary aſſets of the teſtator. But the court held the alienation to be good.

But, if ſuch purchaſer from an executor hath *expreſs notice* of a debt due from the teſtator ſtill unſatisfied, and there be a contrivance between him and the executor to defeat a juſt debt, ſuch tranſaction will be void againſt creditors.

Thus,

Thus, where *H*, being indebted to *C.* on bond, died poſſeſſed of a great perſonal eſtate, and made *W.* executor and deviſee, who waſted the eſtate; *D*, *having notice* of *C*'s debt, bought a leaſehold eſtate of *W.* by diſcounting 200 *l*, due from *H*, 550 *l*, due from *W*, and by payment of 150 *l* in money: on a bill filed by *C.* to have ſatiſfaction for his debt out of the leaſehold eſtate being part of *H*'s aſſets, the queſtion was, whether this was a good ſale to bind a creditor? And it was held it was not, for *D.* was a party conſenting to, and contriving, a *devaſtavit*.

Crane *v.* Drake. 2 Vern. 616.

So, where the deviſee of an eſtate, in truſt for payment of debts, mortgaged the eſtate to one of the creditors, with notice; and the queſtion was, whether ſuch creditor ſhould retain them by way of ſecurity for his own debt, as well for the old debt, as for the money lately advanced? The Chancellor was of opinion, that, though the general rule was, that, a purchaſor or mortgagee need not ſee to the application of the money, where there was no ſchedule of the debts, yet, this rule was never carried ſo far, as to put it in the power of the deviſee in truſt, or of the heir at law, who in equity was conſidered as a truſtee, to favour one creditor, which would be the conſequence if this was allowed. Such creditor

Ithell *v.* Beane. 1 Vez. 215.

creditor, as to his old debt, could not be put into a better condition by taking the mortgage, but muſt come in, *pari paſſu*, with the reſt of the creditors: for, the eſtate was a ſecurity in the hands of the truſtee before, and ſuch mortgage only operated to change the courſe, which the court would not ſuffer the truſtee to do, conſidering the giving preference to one creditor, as a fraud, which the court would not allow.

So, where there was a charge upon a teſtator's eſtate for ſecuring a *ſpecific* ſum, and afterwards a mortgage made by the executor; it was held in the Houſe of Lords, on an appeal, that ſuch ſubſequent mortgagee, ſhould not prevail againſt the deviſees claiming under the charge. The caſe was as follows, *B*, having a term for twenty-one years in a printing-office, made his will, and, thereby, charged the ſame, together with other lands, with payment of his debts and legacies; he then expreſsly deviſed to his executors all his right to the printing-office and all benefit coming therefrom; and willed that, out of the profits thereof, and of his lands, his executors ſhould, *inter alia*, pay the intereſt of 2000 *l*, to his daughter *G*. and her huſband, and, out of the overplus of theſe profits, ſhould raiſe the 2000 *l*, and put it out to intereſt, and made

Humble *v.* Bill. *et al.* 2 Vern. 444. Mich. 1703. Sc. Brown's Caſes 73. Sc. Viner Vol. 8. p. 427. Ca. 13. 462. Ca. 17. Vol. 2. p. 270. Ca. 6.

made *G.* ſole executor, until his ſon *C B.* attained twenty-one, and, then, he appointed both of them executors. Afterwards *G.* and *C B.* mortgaged the term in the printing-office to *B.* for 1000 *l*, which mortgage was afterwards aſſigned to *H.* who advanced 1800 *l*; and it was inſiſted, there was no occaſion to ſell to pay debts, and that *H*, having notice of the will, took the eſtate ſubject to the 2000 *l*. But the court was of opinion, that the executor of a teſtamentary eſtate, had the power over it, ſo as to alien or ſell, as he ſhould judge neceſſary, and that if he ſold in prejudice of a reſiduary or ſpecific legatee, they might have their remedy againſt the executor, but not follow the eſtate into the hands of a purchaſor: and therefore, decreed an account to the plaintiff, of the rents and profits, and that he ſhould enjoy the printing-office, and the defendants redeem, or be foreclоſed; but this decree, as to ſo much of it as tended to the prejudice of the appellants, was afterwards reverſed, upon an appeal to the Houſe of Lords.

If a deed, by which a prior charge is made upon an eſtate, be delivered, among other papers relating to the title thereof, to an intended purchaſor, he will be taken to have notice of the prior incumbrance; it being

being neceſſarily preſumed, that ſo material a circumſtance could not eſcape his notice, or, if it did, it muſt be through groſs neglect.

Ferrars *v.* Cherry *et al.* 2 Vern. 384.

Thus, where the plaintiff's father and mother ſold an eſtate to *C.* and his heirs, which, purſuant to an agreement made on their marriage, had been ſettled on the plaintiff's father for life, part on the mother for her jointure, remainder of the whole on the firſt and other ſons in tail male; and the conveyance was made by deed and fine. *C*, upon his purchaſe, took in a mortgage-term, which was prior to the ſettlement, entered and afterwards ſold the eſtate to *H.* and *I.* It appearing, by the proofs in the cauſe, that *C*, the firſt purchaſor, *had notice of the ſettlement*, and that the ſame, amongſt other writings, were delivered to him: the court decreed, that *C.* ſhould account for the conſideration money, for which he ſold the eſtate, with intereſt from the deceaſe of the plaintiff's father and mother, thereout, diſcounting what was due on the mortgage made prior to the ſettlement.

Ibid. 385.

And, if it doth not appear, upon the face of ſuch ſettlement, whether it be voluntary, or on articles before marriage, and, in conſequence, whether to be conſidered as binding againſt creditors or not, that will not alter

alter the caſe, for the purchaſor, having notice of the deed, muſt, at his peril, purchaſe, and be bound by the effect of it.

But, in the laſt caſe, the bill was diſmiſſed, as to *H.* and *I*, who were made defendants, they having pleaded that they were purchaſors without notice; and the plaintiff not being able to prove any notice againſt them, there being no foundation to preſume knowledge of the ſettlement, *C.* being able to make a good title without it.

The adherence to this rule of equity is ſo ſtrict, that, although there be no poſitive notice contained in a deed, yet if there be words therein, from which the exiſtence of a prior incumbrance muſt neceſſarily be implied, it will be ſufficient to charge a purchaſor.

Thus where a creditor by judgment, in 1698, for 600 *l*, came to an account with the conuſor in the year 1707, and ſettled the remainder due upon the judgment at 420 *l*, and took a mortgage in fee for that ſum, as a collateral ſecurity to the judgment, and one *S.* an attorney in 1716, took an aſſignment of this mortgage, in which there was a recital, *that* 90 *l*, *the conſideration of the aſſignment, was then the full worth of the eſtate.* *S.* was likewiſe in poſſeſſion

Morrett *v.* Paſke. 2 Atk. 54.

of another mortgage made in 1688, upon the ſame eſtate, as was ſubject to the judgment in 1698, and the mortgage in 1707: it was reſolved *S.* ſhould not be allowed to tack the two mortgages together, ſo as to defeat intermediate incumbrances between the years 1688, and 1698; and yet the mortgage in 1707, ſhould have relation back to the judgment in 1698, and by conſolidating them together, ſhould intitle *S.* to receive the ſum due, upon that judgment, prior to creditors after the year 1698; but, as to money reported due ſince the mortgage in 1707, it ſhould be paid only in priority to creditors, ſubſequent to 1707. One ground of which deciſion, was, that the words in the recital of the aſſignment of the mortgage in 1716; *viz*, " that 90 *l*, the conſideration money, was the full worth of the eſtate, *at that time*," naturally implied, that there were intermediate incumbrances, and therefore, to give *S.* the advantage of tacking both mortgages, would be contrary to his own intention; for, at the time he took the aſſignment of this *puiſne* incumbrance, he muſt know the eſtate was worth no more, from the very words of the recital.

But, a ſuſpicion, from deeds, in which a prior incumbrance is recited, being in the hands of a family, is not ſufficient evidence of notice to affect them, if they claim under

a ſettlement, which might be made by an apparent owner, without looking into the deeds, for in ſuch caſe ſomething further muſt be ſhewn.

So, where there was father, mother, and ſon; and the father ſettled an eſtate on himſelf for life, then to his wife for her jointure, and on her death, to the ſons of the marriage; under which ſettlement, the wife and ſon inſiſted on being purchaſors for a valuable conſideration, without notice. Notice of a prior charge was proved againſt the father, by recitals on his own conveyances, and in part by his own admiſſion; but, as to the wife and ſon, there was no proof, but from theſe deeds being in the hands of the family, which was held not ſufficient to affect them with notice.

Whitfield *v.* Fauſſet. 1 Vez. 387.

If a deed, or other paper which is deemed conſtructive notice of a prior incumbrance, be found in the cuſtody of any one, it will be no objection to the charge of notice, that it does not appear when it came there; for if a perſon admits, or a deed be proved to be in his cuſtody, whether as repreſentative of another or otherwiſe, it will be incumbent upon *him* to ſhew when it came there, for it is impoſſible for the other ſide to ſhew it.

2 Vez. 486.

Merry *v.* Abney. 1 Ch. Ca. 38. 1 Vez. 69. 2 Vez. 477.

Notice to a man's ſcrivener, attorney, agent, or counſel, is ſufficient notice to the party himſelf.

Maddox *v.* Maddox. 1 Vez. 61.

And therefore, where *M.* ſuffered a recovery of an eſtate in *A.* and then ſettled all his lands in *A.* upon his family; afterwards a tenement in *A.* of which he had the reverſion after an eſtate for life, deſcending to him in tail by the death of the tenant for life, he ſuffered a recovery of it, and deviſed it to his younger ſon in fee. Then *M.* mortgaged it, together with 200 *l*, that he had a power to charge on the ſettled eſtate, for ſecuring 200*l*, which he borrowed, and then he died. The mortgagee applied to the elder ſon for the money, who at firſt diſputed the payment, but, afterwards, ſubmitted thereto, upon the mortgagee's aſſigning to him the tenement ſo charged, that he might ſtand in the mortgagee's place; to which the mortgagee agreed, upon his covenanting to indemnify him for making this aſſignment, he having heard of the younger ſon's title. The eldeſt ſon then mortgaged the tenement to *B*, who had advanced the money to pay off the former mortgage. It was ſworn, that *B*'s agent was preſent at the execution of the aſſignment, when the indemnity was inſiſted upon: and the agent depoſed, that the deeds were laid before counſel, who made objections

tions about the plaintiff's title. The aſſignment itſelf was ſtrong evidence of notice, for it had not the face of an aſſignment, to a perſon having the equity of redemption, but, was made ſubject to the equity of redemption; and was plainly meant to keep the mortgage on foot, if any other perſon had the equity of redemption, as the covenant to indemnify alſo ſuppoſed. One queſtion was, whether the laſt mortgagee, had not notice of the youngeſt ſon's title? And the court held, here was ſuch evidence of general notice, either to the party himſelf, *or to his agent*, to take care, as made it neceſſary for him to inquire into the title, which not having done, he muſt take the conſequence. 2 Vez. 485.

So, where *E.* mortgaged his manor of *B*, to *M.* and his heirs, for ſecuring 3000 *l*; afterwards *G.* the father of the plaintiff *B.* lent *E.* 2800 *l.* and, by deed, reciting *M*'s mortgage, he declared, that, after the 3000*l*, and intereſt paid, the eſtate ſhould ſtand charged, and be a ſecurity for *G*'s money. *M. was no party to this deed.* Afterwards *H.* one of the defendants, lent *E.* 400*l*, and obtained a decree *from E. and M.* that, after *M.* was paid, the eſtate ſhould, in the next place, ſtand charged with the 400*l*; and in like manner for *C.* and ſeveral other defendants. All the ſecurities were tranſacted at the ſhop of *W.* and *Y.* ſcriveners, who were witneſſes, engroſſed the writings, Brotherton *v.* Hatt. *et al.* 2 Vern. 574.

and were in the nature of agents to all the ſeveral lenders. The queſtion was, whether *B.* ſhould be paid next after *M*, or whether *H.* and the others ſhould be preferred, becauſe they had got a declaration both from *E*, and *M*, who, by that means, became a truſtee for them, after his own money paid? And it was decreed, that *B.* ſhould be paid next to *M*, and ſo on, as the mortgagees ſtood in order of time; for notice to the agent was good notice to the party, and, conſequently, thoſe that lent laſt, muſt come laſt, having notice of what was before lent.

And the law will be the ſame, though one perſon be agent for both parties, nor is it material, on whoſe recommendation or advice the agent was employed. For, where a woman pleaded that the agent, who made her marriage ſettlement, was not employed for her but as an attorney for her intended huſband, admitting, that he might prepare the articles, ſhe having a confidence in him from her huſband's recommendation; ſo that her general denial was to be taken with this admiſſion, which left it open to the proof of notice to her agent, although perſonal notice was denied; it was objected, that notice to her huſband's attorney or agent would not affect her; but it was held that ſhe had ſufficiently admitted that he was agent or attorney for her, by her conſenting to his preparing articles, from a con-

Le Neve *v.* Le Neve. 1 Vez. 65.

fidence

fidence in her huſband; and that it was no matter what ground ſhe went upon, or upon whoſe recommendation or advice, it being the ſame thing to the plaintiffs; for it would be very inconvenient and miſchievous to take into conſideration from whence an agency aroſe. Nor was it material, that the huſband alſo employed him, there being ſeveral caſes where, in marriage ſettlements, the ſame counſel or attorney was employed on both ſides, who would be both affected with notice to him, it being the ſame to a perſon having an equity.

If one purchaſes in the name of another perſon without any authority from him ſo to do, and he not having notice of this intention, yet, if he afterwards *agrees to it*, he makes the former his agent *ab initio*.

Thus where *G*, in 1699, lent *W*. 200*l*, upon a ſurrender of copyhold lands, but neglected to get the ſurrender preſented at the next court day as he ought to have done, for want of which the ſurrender was void, according to the cuſtom of the manor. In 1703, *B*. agreed with *W*. to purchaſe the mortgaged premiſes for 400 *l*, and took a ſurrender in the name of *M*, who, afterwards, conſented to become the purchaſor, and paid the money. It was proved, that *B*, whilſt he was treating with *W*, had notice of

Jennings *v*. Moore *et al*. 2 Vern. 609. Sc. 1 Brown's Parl. Ca. 244. *et vid*. Merry *v*. Abney. 1 Ch. Ca. 38.

the former incumbrance, and therefore declined to purchaſe in his own name, and took the ſurrender in the name of *M*, and procured him to become a purchaſor, that *B*. might be paid a debt, which *M*. owed him, out of the conſideration money.

On a bill filed by the executor of *G*, *M*, pleaded himſelf to be a purchaſor without notice of the plaintiff's demand; and that his ſurrender was preſented, and he admitted tenant, without notice of *G*'s ſurrender, which was kept in his poeket, and not preſented till long after his purchaſe, ſurrender, admittance, and payment of his conſideration money. But it was adjudged at the Rolls, that notice to *B*. was ſufficient to affect *M*; for, though he did not employ *B*. to purchaſe for him, or knew any thing of it until after *B*. had agreed and taken the ſurender in his name, yet he, by approving of it afterwards, had made *B*. his agent *ab initio*; and *M*. was decreed to pay the 400 *l*, and intereſt, or to ſurrender to the executor of *G*.

Caſe of Ld. Falconbridge cited 2 Vez. 369. Ibid. 370.

But, examining a title, in the ordinary courſe of buſineſs, which cannot be ſuppoſed to make any impreſſion, as to any future event, will not operate as conſtructive notice to an agent in general, or counſel, or attorney

attorney, to affect his client on a ſubſequent tranſaction, at a diſtant period; for, an agent or counſel cannot be ſuppoſed to remember every particular circumſtance, contained in deeds or papers that come under his peruſal.

Thus, where lands were ſettled by *F.* on his marriage in 1734, which he mortgaged, among others in 1736, to *W*, who had no notice of the ſettlement, and *R.* was employed as agent in making both the ſettlement and the mortgage. One queſtion was, whether *W.* ſhould be conſidered, as having notice of the ſettlement, *R.* having acted as agent on both occaſions? And the court held, that affecting a perſon with notice of the title of another, by reaſon of his agent's having notice of it, had not been carried ſo far, as to affect the principal unleſs where the agent had it, at the time of his tranſaction with him; and that, as the notice which the attorney had of the ſettlement, in this caſe, was two years before the mortgage, the mortgagee could not be affected by it.

Steed *v.* Whitaker Barnard 220.

It hath not been ſettled, whether, where one employs an attorney or counſel, and, for want of diſpatch, takes the matter afterwards out of his hands, and gives it to another agent to finiſh, and the firſt agent acknow-

Gilb. Eq. Rep. 7, 8.

leges notice, but no proof of notice of a prior incumbrance can be had againſt the ſubſequent agent, notice to the firſt agent ſhall bind the party himſelf. But it ſeems reaſonable that, *in the caſe put*, the client ſhould be bound; for, the firſt agent is ſtated to have entered upon the buſineſs, the laſt agent to have finiſhed it, and the law preſumes, that whatever is known to the agent is likewiſe known to the principal; therefore, as the client muſt be conſidered, in law, as taking the buſineſs out of the hands of the former agent with all the information the former agent had thereupon, the client muſt, conſequently, be conſidered, either as having loſt that knowledge on the transfer to the laſt agent, which would be abſurd, or, as delivering the matter over to him ſubject thereto: any other conſtruction would open a door to great fraud between a firſt agent and his client, for, then, the latter, on diſcovery that the former had notice, might remove any impediment ariſing from notice to his firſt agent, by taking the buſineſs out of his hands and giving it to a new agent.

But, the law might be more doubtful, if the firſt agent, by any accident, had given up the buſineſs, *without entering thereupon*; for, it would be carrying this doctrine of notice very far indeed, to ſay, that the meer depoſiting

depoſiting the papers in an agent's hands, with a view to employ him, and taking them away before inſpected, ſhould be notice to the client of a fact, of which, the age , had he inſpected them, would have found himſelf having notice. *Sed quære.*

And, though an attorney or counſel concerned for one of the parties may, if he pleaſes, demur to being examined as a witneſs, yet, if he conſents, the court will not refuſe reading his depoſition, for the right to object is *his* privilege, not that of his client. 1 Vez. 63.

If an eſtate be ſettled upon truſt for raiſing a ſpecific ſum, and afterwards a mortgage be made thereof to a mortgagee, with notice of that truſt, and then a ſubſequent mortgage be made to one who hath notice of the prior mortgage, but not of the antecedent truſt of which the firſt mortgagee had notice, yet the laſt mortgagee muſt take ſubject to that demand; for he, having notice of the firſt mortgage which is prior to his, but poſterior to the truſt, muſt conſequently take, ſubject to the firſt mortgage; and being ſubject to that, muſt be ſubject to every thing that was ſubject to. This may be proved, by conſidering the right and order of redemption in the court; as for example, the *ceſtui que truſt* of the truſt-eſtate, having a prior incumbrance, may compel the firſt mortgagee to redeem him; which Earl of Pomfret. *v.* Lord Windſor. 2 Vez. 485.

which if done, the former will have a right in both capacities to compel the laſt mortgagee or thoſe claiming the benefit of that mortgage, to redeem him or be foreclоſed, which muſt be to redeem him as to both; for a court of equity will not take from the *meſne* mortgagee the legal eſtate, which he will have got from the truſtees, unleſs his demand be wholly ſatisfied.

Notice of an act of bankruptcy will not be preſumed againſt a *puiſne* mortgagee, who lends his money after the act of bankruptcy committed, to take from him the benefit of an *eigne* incumbrance purchaſed in; for though, at law, the aſſignment to the aſſignees hath relation back to the time of the act of bankruptcy committed, and the conſtruction of ſtatutes be the ſame in equity, as at law, yet it would be too hard to extend a penal law, in a court of equity, to the prejudice of the mortgagee. Beſides, where a ſtatute is to be carried into execution, *in equity*, the rule, *that a purchaſor for a valuable conſideration without notice* ſhall not be deprived of any advantage, which will enable him to defend himſelf, will be applied, as well, in caſes ariſing under an act of parliament, as, in thoſe, occurring at common law.

Collett *v.* Deſols & Ward.

Thus, where *T.* having made mortgages of ſome parts of his eſtate, theſe mortgages afterwards

afterwards by *meſne* aſſignments became veſted in *W.* and carried with them the legal eſtate. *T.* then became a bankrupt, but, before the aſſignment of *T*'s effects to the aſſignees, *W.* obtained a releaſe of the equity of redemption from *T.* for a valuable conſideration; on a ſuit brought by the aſſignees againſt *W.* to ſet aſide theſe conveyances, it was held, that a purchaſor for a valuable conſideration without notice of the bankruptcy, could not be relieved againſt, within 21. *Jac.* 1. Ca. temp. Talbot 65.

And, if the mortgagee hath a better title or right to the legal eſtate, although it be not conveyed to him, yet he may protect himſelf, thereby, from an act of bankruptcy.

So, where *H B.* on *May* 1ſt 1701, was arreſted at the ſuit of one *S.* for a juſt debt of 700 *l*, ſecured by bond; he, for delay, pleaded it was for money won at play, and held out the plaintiff above ſix months. Which, although he afterwards paid the debt and many thouſand pounds to others, and appeared publickly on the exchange, was adjudged an act of bankruptcy by the ſtatute of *Jac* 1. Afterwards, in 1717, *H B.* on the marriage of the defendant, his ſon, made a ſettlement, by which, after reciting, that he had on his own marriage ſettled lands on truſtees, in truſt, to ſecure 2000*l*, to his wife if ſhe ſurvived; *H B. with the privity of the truſtees, who were parties to it*, aſſigned all his eſtate, right, title and Wilker v. Bodington. 2 Vern. 599.

and intereſt to the wife's relations for the benefit of *H B.* for life, and of his wife for life &c. The plaintiff *W.* was the aſſignee under a ſtatute of bankruptcy, taken out, againſt *B*, ſubſequent to the ſettlement. The queſtion was, whether a court of equity would decree the truſtees, of the firſt ſettlement, to aſſign the term to the plaintiff, or ſuffer it to reſt, in them, to protect the ſettlement?

For the defendants it was inſiſted, that they being purchaſors without notice of the bankruptcy, equity ought not to impeach their title, if they could defend themſelves at law; and that, although they had not the legal eſtate in them, yet, the truſtees of the firſt ſettlement, in whom the legal eſtate was, being parties to the laſt ſettlement, were become their truſtees. And it was ſo held by the Chancellor, who ſaid, he took it to be the rule in equity, that where a man, was a purchaſor without notice, he ſhould not be annoyed in equity, not only where he had a prior legal eſtate, but where he had a better title, or right, to call for the legal eſtate than another; and, therefore, diſmiſſed the bill.

A mortgagee may tack a *puiſne* to an *eigne* incumbrance, notwithſtanding an intermediate judgment at law; for, though of record, it will not affect him, without he be proved to have had expreſs notice thereof, before he lent his money.

Thus,

Churchill *v.* Grove. 1 Ca. Ch. 35. *et vid.* Greſwold *v.* Marſham. 2 Ch. Ca. 170.

Thus, where the plaintiff, having a judgment and a mortgage, exhibited his bill againſt the mortgagor and conuſee of a ſtatute by the mortgagor, to have a diſcovery of what was due on the ſtatute, that being precedent to the plaintiff's ſecurities, and, upon payment, to have the ſame ſet aſide; the conuſee pleaded, that, after the extent, the accounts had been ſtated between him and the conuſor, and an abſolute conveyance of part of the extended lands had been made to him in conſideration of his re-aſſigning the remainder to the conuſor; and, that ſo, he was a purchaſor, for a valuable conſideration, without notice of the plaintiff's title.

Ibid.

It was inſiſted, on behalf of the plaintiff, that his judgment being of record, the defendant was bound to take notice thereof, at his peril, and that, in this caſe, the defendant ought not to protect his pretended ſubſequent purchaſe by his precedent ſtatute, but, that he ought, upon payment of the ſtatute, to yield poſſeſſion to the plaintiff.

Ibid.

This was ſtrongly oppoſed by the defendant's counſel, who argued, that though judgments were of record, and a purchaſor was bound to take notice of them at law; yet, in equity, where the conuſee of a judgment comes to be helped to extend his judgment againſt a purchaſor, he muſt prove expreſs notice of the judgment in the purchaſor,

or,

or, elſe, ſhall never be relieved againſt him; and upon this point the plea was allowed.

But, in the laſt caſe, the term, "expreſs notice," muſt be underſtood, as uſed in oppoſition to conſtructive notice ariſing from the act being of record; for, I apprehend, what ſhall, or ſhall not, be conſidered as evidence of notice of a judgment, independent of the record, is open to the opinion of the court, and reſts, either in poſitive proof of the expreſs fact of notice, or, in implication from other facts proved, irreconcileable with want of notice of the exiſtence of the fact, notice of which is charged. And, conſequently, that if there be any circumſtances in the caſe, from whence it may reaſonably be concluded, that the *puiſne* incumbrancer had notice of a judgment ſtanding out, at the time of advancing his firſt money, the court will not ſuffer him to protect himſelf by getting in a prior charge on the land, although no expreſs notice be proved.

If there be ſeveral mortgages of lands lying in a regiſtered county, each of them being regiſtered in their proper order, and afterwards the mortgagee *eigne*, having the legal eſtate, advances a further ſum of money to the mortgagor, the regiſtry of the intermediate incumbrances, will not be conſtructive notice of them to him, to take from

him the benefit of protecting himſelf by his legal title.

Thus, where *A.* lent money on lands, the mortgage being duly regiſtered, and afterwards *B.* lent money on mortgage on the ſame ſecurity, and his mortgage was alſo regiſtered, and then *A.* advanced a further ſum on the ſame lands without notice of the ſecond mortgage; it was held, by Lord Chancellor *King*, that the regiſtering of the ſecond mortgage was not *conſtructive* notice to the firſt mortgagee before his advancement of the latter ſums; for, though the ſtatute avoided deeds not regiſtered, as againſt purchaſors, yet, it gave no greater efficacy to deeds that were regiſtered, than they had before.

Bedford *v.* Backhouſe. 1 E. Ca. Abr. 615. 12.

So in a later caſe where *W.* advanced 800 *l.* on a mortgage in *Yorkſhire*, and regiſtered it; afterwards *K.* lent a ſum of money, and took a judgment for it, which was alſo regiſtered, then *W.* advanced a further ſum, but without any expreſs notice of the judgment; it was argued, on a bill brought by *W.* to foreclose, that *K.* ought to redeem, on paying the firſt mortgage; for that, where ſuch regiſters prevailed, every incumbrancer ſhould be ſatisfied according to the priority of his regiſter; and that the regiſtering *K*'s judgment was conſtructive notice to *W.* ſufficient

Wrightſon *et al. v.* Hudſon *et al.* 2 E. Ca. Abr. 609. 7.

ficient to deprive him of the common benefit of a court of equity, whereby a firſt mortgagee, without notice, was to hold till all ſubſequent incumbrances due to him were diſcharged. But it was reſolved, that theſe ſtatutes avoided only prior charges not regiſtered, but did not give *ſubſequent* conveyances regiſtered any further force againſt *prior* conveyances regiſtered, than they had before; and that to have affected *W*, *K*, ought to have given him notice when he advanced his money; for, though *W*. might have ſearched the regiſter, yet he was not bound ſo to do.

This conſtruction of the regiſtering act, appears to me, conſonant to the general principles of law and equity; for, if the ſecond mortgagee had uſed due diligence, he might have informed himſelf by the regiſter, who was the prior mortgagee, and by ſerving an actual notice upon him, effectually ſecured himſelf againſt any further loan: and therefore this caſe falls within the common rule, that, where, of two perſons equally innocent, or equally blameable, one muſt ſuffer, the loſs ſhall be left with him on whom it is fallen. The ſecond mortgagee having no more claim to equity than the firſt, the former will be left in poſſeſſion of the benefit, the law gives him, of protecting himſelf by the legal eſtate.

But

But a ſubſequent mortgagee, having notice of a prior mortgage not regiſtered, will not gain a priority by regiſtering; becauſe ſuch conduct is conſidered, in equity, as fraudulent, and the party hath that notice which the act of parliament intended he ſhould have. Cowper's. Rep. 712.

As, where *N*, in 1718, married his firſt wife, and, on the marriage, a leaſehold eſtate in the poſſeſſion of his father, was covenanted, in conſideration of the marriage and her perſonal eſtate, to be ſettled on truſtees, in truſt, for *N*. for life, then for his intended wife for life, remainder to the iſſue of the body of *N*. by his wife, in ſuch manner as he, by deed or will, ſhould appoint. The marriage was had, and a ſettlement made, in purſuance of the articles: the wife had iſſue, and died. In 1743. *N*. married a ſecond wife, but, previous thereto, entered into articles with her truſtees for ſettling the very ſame eſtate on himſelf for life, then on her for a jointure, remainder to the iſſue of that marriage; and a ſettlement was made purſuant thereto. The eſtate was ſubject to the ſtatute 7. Queen *Anne*, cap. 20. which requires regiſtry. The firſt marriage articles and ſettlement were never regiſtered. The ſecond were. *N*. alſo mortgaged this eſtate, as abſolute owner thereof. Le Neve *v.* Le Neve. 1 Vez. 64. Supra. 244.

The bill was brought by the children of the firſt marriage, to have the benefit of the ſettlement made on them, and, in order thereto, to have the ſubſequent articles and ſettlement poſtponed, though regiſtered.

The ground of this application was, that the agent, who made the laſt ſettlement, had notice of the firſt. And, notice to the agent having been fully made out, the principal queſtion was, whether it would affect the defendant's purchaſe, and oblige the court to poſtpone the ſecond articles, and ſettlement to the firſt, notwithſtanding the regiſtering act?

And the court determined it would; for the intent of the act was to ſecure ſubſequent purchaſors and mortgagees againſt prior ſecret conveyances, by letting a ſubſequent purchaſor, having regiſtered, prevail againſt a prior ſecret conveyance of which he had no notice; but if he had notice of a prior conveyance, which was veſted property, that was no ſecret conveyance. The ſtatute did not ſay, that the ſubſequent purchaſor ſhould not be affected, by any equity whatſoever; therefore, though the manifeſt operation of it was to veſt the legal eſtate according to the prior regiſtering, yet, it was left open to all equity; for there was no danger to the ſubſequent purchaſor, who might

might refuſe, if he had notice of the prior good conveyance.

And this doctrine was confirmed in the Houſe of Lords, upon an appeal, in the caſe of Lord *Forbes* v. *Deniſton* which aroſe in *Ireland*.

Recited in laſt Caſe. 1 Vez. 67. 2 Brown's Parl. Ca. 425.

I have not met with any caſe wherein it hath been determined, that a *puiſne* mortgagee, where there are ſeveral incumbrances regiſtered, ſhall protect himſelf, by purchaſing in an *eigne* incumbrance, which brings with it the legal eſtate; but that caſe, ſeems to fall within the ſame reaſon as the laſt.

It is evident from the preamble of the 2. and 3. *Ann.* c. 4. that the object of the legiſlature, in that ſtatute, (which laid the foundation of the ſubſequent regiſtering acts,) was to enable mortgagors to give ſuch ſatisfactory ſecurity to monied men, as would induce them to advance their money, on landed ſecurity, to perſons in trade, which it was thought would tend to the national benefit.

The mode adopted by the legiſlature to effect this purpoſe, was, to ſecure them againſt prior claims, by eſtabliſhing a regiſter, where all incumbrances that affected the eſtate might be ſeen; and by giving ſecurities regiſtered, though poſterior in date, a

priority: but it was not neceſſary to alter the law, as to the priority amongſt incumbrances regiſtered; for, if a mortgagee neglects ſearching the regiſtry, he ceaſes to be an object of legal favor. And, if he ſearches, and notwithſtanding there be an incumbrance prior to his, lends his money, he takes the equitable eſtate, *only*, with notice, and, having voluntarily accepted it, of courſe becomes liable to the incidents and contingencies to which that kind of ſecurity is, in its nature, expoſed.

The true conſtruction of the act therefore ſeems to be, that it has left mortgagees, whoſe incumbrances are regiſtered, in the ſame ſituation, as to each other, as they were previous to theſe ſtatutes. In which caſe, the *puiſne* mortgagee, having purchaſed in the firſt incumbrance, would have been intitled to a priority; he having the beſt title in law, and as much equity as the *meſne* mortgagee.

Senhouſe *v.* Earle.
2 Vez. 450.
Perrat *cont.* Ballard.
2 Ch.Ca. 73.
Ibid. 135.
136.
1 Vern. 27.

It is an infallible rule, that a mortgagee may, in a court of equity, protect himſelf from diſcovery of his title deeds, if he denies notice. For, if a plaintiff brings his bill to redeem ever ſo ſtrongly, he is not intitled to ſee the mortgagee's title deeds, becauſe a third perſon may find out a flaw in them. The rule appears to be the ſame on motion,

motion, where there is to be a ſale to raiſe the mortgage money; this is a firſt principle, and not to be argued, and depends on the denial of notice.

Thus, where the plaintiff's bill was to ſet aſide a conveyance made to the defendant by *A.* on the ground that the defendant was no real purchaſor, or, if he were, yet, before his purchaſe, he had notice that the eſtate was ſubject to a truſt for the plaintiff, and that a leaſe in the defendants cuſtody mentioned it. The defendant ſwore himſelf a purchaſor without notice of any truſt, and that the leaſe mentioned no ſuch truſt. The plaintiff replied. The defendant proved his purchaſe, and the plaintiff proved no notice upon him. But, at the hearing, it was inſiſted, that he ought to produce the leaſe to ſhew there was no mention of the truſt; beſides, the anſwer being replied to, it was ſaid, he was bound to prove it, which he could not do, without ſhewing the deed; for he took upon himſelf to judge what deed would amount to notice, and what would not, which he ought not to do. For, implied notice being as ſtrong as expreſs notice, if the leaſe mentioned *only the date and parties of another deed, which mentioned a truſt*, it was deemed an implied notice, which the defendant might not know; and, therefore,

Hall *v.* Atkinſon. 1 E. Ca. Abr. 333, 4.

the court ought to ſee it, that they might judge of it.

Ibid. But, it was argued on the part of the defendant that, being a purchaſor, by the rule of the court he was not obliged to produce this leaſe, or ſhew his title; that, this was an attempt to alter that rule, by a ſide-wind, and that it was as eaſy to ſay in a bill, it was in ſome of the deeds, as, in any one in particular, and then he muſt expoſe them all, which would be of dangerous conſequence to purchaſors.

Ibid. It was replied, that, if the deed were not produced, then, if one had a mortgage with a proviſo of redemption, yet, if the mortgagee was hardy enough to ſwear it an abſolute purchaſe, and the mortgagor had no counterpart, he muſt loſe his eſtate.

Ibid. The Maſter of the Rolls thought that, as this caſe was, the deed ought to be produced; but the Lord Keeper held otherwiſe, ſaying, it was a ſide-wind to make a purchaſor expoſe his title, which his Lordſhip would not do, *unleſs the plaintiff had made ſome proof*, tending to falſify the anſwer, to induce him to it.

Brampton *v.* Barker. So where tenant for life, remainder to his firſt ſon, mortgaged for 1500 *l*, the deed of

of ſettlement was produced and ſeen by the purchaſor, who lent the money, notwithſtanding; being adviſed that the tenant for life, not having then any ſon born, could deſtroy the contingent remainders. And though, in truth, there was a ſon born five days before the lending of the money, yet, the mortgagee having no notice thereof, and having got the deed of ſettlement, the court would not relieve againſt him by compelling him to produce it.

2 June 1671. Cited 2 Vern. 159. 1 E. Ca. Abr. 333. 3.

But, in caſes where money, to pay off a mortgage, is to be raiſed by ſale of the eſtate mortgaged, and the purchaſe cannot be compleated without production of the title-deeds, I ſhould apprehend, that, on the mortgagor, or thoſe intereſted in the ſale, entering into an agreement to take no undue advantage thereof, the court would order them to be forth-coming.

Thus, upon a ſuggeſtion that the purchaſe was made at a price greatly under its value, the court ordered, that the defendant in the ſuit ſhould anſwer what, and how much, he paid, provided the plaintiff conſented to take no advantage of the diſcovery at law.

Wagſtaff *v.* Read. 2 Ch. Ca. 157.

If *A.* purchaſes an eſtate, with notice of an incumbrance, or, that it is redeemable,

Harriſon *v.* Forth. Prec. Ch. 51. *et vide* alſo

Lowther *v.* Carleton Ca. temp. Talbot 187.

and then ſells to *B*, who has no notice, who afterwards ſells to *C*, who has notice, by this the notice to *A*, the firſt purchaſor, will not be revived; for, if it were ſo, an innocent purchaſor, without notice, might be forced to keep his eſtate; he could not ſell, and would be accountable for all the profits received *ab initio*.

Bentham *v.* Haincourt. Pre. Ch. 30.

Where a mortgagee, after notice of a ſubſequent mortgage, joined with the mortgagor in ſale of the lands to a ſtranger, it was reſolved, that the money received, by either, for the purchaſe, ſhould ſink ſo much of the mortgage money.

Tonkins *v.* Ennis. 1 E. Ca. Abr. 334. 6. Cowper's Rep. 711. Gardiner *v.* Painter. Sel. Ca. Ch. 65. Infra.

A purchaſor for a valuable conſideration ſhall hold, or take place, againſt a prior voluntary ſettlement, though he hath expreſs notice thereof, at the time of his purchaſe; ſuch voluntary ſettlement being made void, againſt a purchaſor, with, or, without notice, by the 27th *Eliz.* c. 4.

CAP.

CAP. IX.

To whom Lands forfeited, under a Mortgage, shall belong.

GReat doubts were formerly entertained, when a mortgage was made upon condition that, if the mortgagor, at a certain time, paid a certain sum to the mortgagee, his heirs, executors, or administrators, then the mortgagor should re-enter, and the day passed without payment, and the mortgagee died, whether the money should be paid to the heir or executor of the mortgagee. And a distinction was taken between cases, where there appeared to be a bond for payment of the money, and the condition of the redemption was upon payment to the executors without naming the heir; and those, where the mortgage was in fee and there was neither bond nor covenant for payment, or, where the condition of redemption was, upon payment to the heir or executor, or heirs and assigns of the mortgagee, and there was no deficiency of assets to pay creditors. For, in the latter cases, the

1 Eq. Ca. Abr. 326. Pl. 1, 2, 3. 1 Ch. Ca. 88. 2 Ch. Ca. 187.

Tilly *v.* Egerton. 1 Rep. Ch. 183.

Turner *v.* Turner. 2 Rep. Ch. 155. Turner *v.* Crane. Ibid. 242. Sc. 1 Vern. 170.

the money was decreed to the heir, in the former, to the executor; becauſe, upon theſe circumſtances, the court determined whether the mortgagee meant to change the nature of his property, from perſonal into real. But, ſince courts of equity have conſidered contracts on mortgages as merely perſonal, it hath been ſettled otherwiſe; and now, it is a rule, *in all caſes*, that the mortgage-money ſhall be deemed part of the perſonal eſtate and belong to the executor or adminiſtrator, *unleſs*, an intention be declared by the mortgagee, or it appears, evidently, from his conduct, that it ſhould not be ſo conſidered; as, if he foreclose, or obtain a releaſe of the equity of redemption, and get actual poſſeſſion of the premiſes.

Thornborough *v.* Baker *et al.* 1 Ch. Ca. 283. Noy *v.* Ellis. 2 Ch. Ca. 220. 2 Vent. 348. Hard. 467. Canning *v.* Hicks. 2 Ch. Ca. 187. Infra. 271. Wynne *v.* Littleton. 2 Ch. Ca. 51, 52.

Thus, where *C.* lent *B.* 500*l*, upon a mortgage by leaſe and releaſe, and it was agreed, by a ſeparate indenture, that, if *C.* ſhould, during his life, pay *B.* his heirs, executors, adminiſtrators or aſſigns 30*l*, by half yearly payments, at *Lady day*, and *Michaelmas*; and, if the heirs of *C.* ſhould, within ſix months after his death, pay to *B.* his heirs, executors, adminiſtrators, and aſſigns the ſaid ſum of 500*l*, *then*, the leaſe and releaſe to ceaſe and be void. *B.* died, leaving other aſſets, and, default having been made in payment and the premiſes being thereby forfeited, the mortgaged lands

lands deſcended to his ſon. On a bill exhibited for redemption, the principal queſtion was, whether the mortgage-money ſhould be paid to the heir, or to the perſonal repreſentative? And it was decreed that it ſhould be paid to the latter; becauſe, the reaſon of the common law, in theſe caſes, ought to be followed, in equity, as nearly as might be. And, at common law, if conditions, or defeazances of mortgages, were ſo penned as to make no mention either of heirs or executors, the money ought to be paid to the executors; for, it came out of the perſonal eſtate, and, therefore, ought to return thither again; it being equitable, *that the ſatisfaction ſhould accrue to that fund which ſuſtained the loſs*. But, where the defeazance appointed the money to be paid to the heirs or executors, *diſjunctively*, if the mortgagor paid the money preciſely at the day, he might elect to pay it to either of them; for, that would have been a performance of the condition, which was all he had to do. But, when the preciſe day was paſſed and the mortgage forfeited, all election was gone in law; for, in law, there was no redemption. And, when the caſe was reduced to an equity of redemption, it would be perfectly againſt equity to revive the election of the mortgagor; becauſe, that would only tend to a delay of the payment of the money as long

as he pleaſed, and end in compoſitions to pay the money into that hand which would uſe him beſt. And, to ſay that the election ſhould be in the court, would be to place an arbitrary power therein, which would tend to the inconvenience of the ſubject; ſince, no man could ſafely pay the money, in ſuch caſes, without a ſuit in equity. And therefore, ſince there ought to be a certain rule, a better could not be choſen, than to come as near as might be to the rule, and reaſon of the common law; and, as the law always gave the money to the executor, where no perſon was named, or where the election to pay, either to the heir, or executor, was gone and forfeited in law, (in which latter caſe, it was the ſame as if neither heir or executor had been named in the condition;) ſo, equity, following the rules of the common law, ought to give it to the executor. For, in natural juſtice and equity, the principal right of the mortgagee was to his *money*, and his right to the *land* was only as a depoſit or pledge for it; therefore, the money ought to be paid to the proper hand that the mortgagee had appointed receiver of it, which was his executor. And then the heir, who was only a truſtee to keep the pledge, ought to deliver it back to the mortgagor: for, though the heir had the uſe and benefit of the land, until redeemed, yet, he had

it

it only as a pledge; conſequently, was a truſtee to reſtore it when the money was paid to the proper hand; and the heir himſelf, though he was proper to keep the pledge, being land, yet was not proper to receive the money, being purely perſonal. Nor was it hard that the heir ſhould part with the land, without having the money that came in lieu of it, becauſe the money was originally parted with from the perſonal eſtate, and would have immediately come into the hands of the executor, had it not been placed out on real ſecurity; and the right to receive a ſum of money, the payment of which was a perſonal duty independant of the condition of the mortgage deed, ought always to be certain, not variable upon circumſtances. Therefore, it was not material, in this caſe, that the perſonal repreſentative had aſſets without this money; for, aſſets or not aſſets was not the meaſure of juſtice to executor or adminiſtrator; but ſerved only, as a pretence, to favour the heir, who, either ought to have the money, if there were no aſſets, or ought not to have it, although there were. For the ſame reaſon, it was not material, that there wanted the circumſtance of a perſonal covenant from the mortgagor to pay the money; for, though the caſe of the adminiſtrator of the mortgagee would have been ſtronger with it, yet, it was ſtrong enough without it.

Vid. Supra. 3, 4.

it. In this caſe, a diſtinction was taken between a mortgage, and an abſolute conveyance with a collateral agreement to reconvey upon re-payment of the purchaſe money; and the court ſaid, that all mortgages ought to be looked upon as part of the perſonal eſtate, unleſs the mortgagor, in his life-time, or, by his laſt will, did otherwiſe declare and diſpoſe of the ſame.

Turner's caſe. 2 Vent. 348.

So, where a mortgage was made in fee, and deſcended to the *heir at law of the mortgagee, which heir at law* had been paid the money ten years before application made for it, by *the perſonal repreſentative* of the mortgagee; on the latter exhibiting his bill, he had a decree for it, but, without intereſt.

Sir Thomas Littleton. 2 Vent. 351.

And, if the mortgage be in fee, conditioned, that the mortgagor ſhall pay the money to the mortgagee, his heirs, executors, adminiſtrators or aſſigns; and the mortgagee die before the mortgage forfeited, in conſequence of which, the mortgagor has his election to pay the money to either; yet, it will belong to the executor.

Barnard. 50.

So, in all mortgages in fee, a man's heirs are truſtees for his executors.

The bequeſt of a ſpecific legacy to the executor, was held not to bar him of money due

on mortgage. Thus, where a mortgagee in fee, after deviſing ſeveral legacies, gave 100 *l*, to his executor, *expreſsly willing, that he ſhould not be paid until after his debts and other legacies were diſcharged*; it was argued, in favour of the heir at law, *that*, it was a neceſſary implication that the executor ſhould have no more than the 100 *l*; for, it was the ſame as if he had expreſsly deviſed the 100 *l*, out of the reſidue of his eſtate, after his debts and legacies paid; from which, it might be ſtrongly inferred he meant no more than that ſum, and, not the whole reſidue. But, the court decreed againſt the heir.

Canning *v.* Hicks. 2 Ca. Ch. 187. Sc. 1 Vern. 412. *Sed vid.* 14 Geo. 2. c. 20. ſ. 9.

And, if the mortgagor doth not redeem, the adminiſtrator ſhall have the land. Thus, where the mortgage was forfeited, the heir in poſſeſſion by deſcent, no want of aſſets, and the mortgagor did not offer to redeem; the heir of the mortgagee was decreed to convey the lands to his adminiſtrator; for as the money, being part of the perſonal eſtate, would have gone to him, ſo would the land, which was in lieu thereof.

Ellis *v.* Gnavas. Supra. 164. 2 Ch. Ca. 50. Canning *v.* Hicks ſupra.

So, where a mortgage was made of a copyhold by a ſurrender thereof to *P*, who was admitted tenant, and died in 1690, leaving *T.* her ſon and heir and executor; *T.* entered and was alſo admitted, and, afterwards,

Tabor *v.* Grover. 2 Vern. 367. Sc. 1 Eq. Ca. Abr. 328. Wood *et al. v.* Noſworthy. cited 2 Vern. 193.

wards, by his will, but without any ſurrender to the uſe thereof, deviſed it to *R*, who was alſo adminiſtrator *de bonis non* to *P*. *R*, exhibited his bill againſt *G*. who was heir at law both to *P*. and *T*. and claimed this as a real eſtate, it having been ſo long ſince forfeited, two deſcents caſt, more being due thereupon than the value of the eſtate, the mortgagor by anſwer having refuſed to redeem and ſubmitted to be foreclоſed, and the deviſe by *T*. to the plaintiff being void, at law, for want of a ſurrender to the uſe of the will. But, it was decreed to the plaintiff, as adminiſtrator *de bonis non* to *P*; and the decree was affirmed upon appeal, there being no foreclоſure nor releaſe of the equity of redemption, in the life-time of the mortgagee.

2 Vern. 193. Although a mortgagor, the mortgage being forfeited, releaſes to the heir of the mortgagee in fee, yet, the adminiſtrator ſhall have the benefit of that eſtate, even though there be no debts. And ſo it is in caſe a mortgagor be foreclоſed, or, that the mortgage be of ſo ancient a date, as, in the ordinary courſe of the court, it be not redeemable; *for, in caſe the mortgagee be not actually in poſſeſſion, it will be looked upon* to be perſonal eſtate.

And

And, where there was huſband and wife, and the wife, having a mortgage in fee of a copyhold, died leaving iſſue, which iſſue was admitted and died, and then the huſband, as adminiſtrator to his wife, claimed title to the copyhold, being a mortgage, and ſo part of his wife's perſonal eſtate: it was decreed to him againſt the heir at law, although the latter had been admitted. Turner *v.* Crane. 1 Vern. 170.

So, a mortgage of an inheritance, to a citizen of *London*, hath been held to be part of his perſonal eſtate, and divided according to the cuſtom. 1 Ch. Ca. 285. 1 Vern. 4.

But, if the poſſeſſor of the eſtate *apprehends* himſelf to hold it in fee, his intereſt will not be conſidered as perſonal, againſt his evident intention. As, if a mortgaged eſtate be ſold, by the mortgagee, to a third perſon, who meant to realize, but is deceived in his purchaſe; the money paid by him will, on repayment, go as the eſtate would have done. For, in this caſe, the intention of the vendee is to alter the nature of his property, and to inveſt his perſonal eſtate in the purchaſe of land; and, therefore, the court will conſider it *as land*, when, by an accident, his intent would, otherwiſe, be fruſtrated.

Thus, where a mortgagee in fee entered, and, after ſeven years enjoyment, ſold the Cotton *v.* Iſles. 1 Vern. 271.

lands, abſolutely, to *I S.* and his heirs: the court decreed, that the eſtate ſhould not be looked upon to be a mortgage, in the hands of *I S*, ſo as to make it part of his perſonal eſtate, but, ſhould be deemed real property for the benefit of his heir.

So, if it appears to be the intention of the mortgagee, that the mortgage ſhould paſs, by deviſe, as a real eſtate, the executor will not be intitled.

Noys *et ux. v.* Mordaunt *et al.* 2 Vern. 581.

As, where the teſtator, having ſeveral mortgages, and, among the reſt, a mortgage in fee of lands in *F*, deviſed his mortgages to his two daughters, their executors and adminiſtrators, and his lands in *F*, upon which he had entered upon forfeiture of the mortgage, to them and their heirs. *M*, one of the daughters, dying without iſſue, *H*, her huſband and adminiſtrator, claimed a moiety of the lands in *F*. as part of his wife's perſonal eſtate, it being a mortgage not foreclоſed, or the equity of redemption releaſed. But it was held, that, although it was a mortgage, as between the mortgagor and mortgagee, yet, the teſtator's intent was, that it ſhould paſs, to his daughters, as a real eſtate to them and their heirs, and not, as part of his perſonal eſtate; and that *M*, the wife of *H*, being dead without iſſue, it deſcended and went to her ſiſters, as her heirs at law; and that *H*, as adminiſtrator to his wife,

wife, ought not to have any part thereof, as perſonal eſtate.

If two perſons advance a ſum of money on mortgage, and take the mortgage to themſelves jointly, and one of them dies; when the money comes to be paid, the ſurvivor ſhall not have the whole, but the repreſentative of him that is dead, ſhall have a proportion. Thus, where *N.* and *S.* lent 2000*l.* to *G*, on mortgage; 1450*l.* whereof, was the money of *S.* and 550*l*, the reſidue, the money of *N*; and it appeared, by a note under both their ſignatures, that the 1450*l.* was delivered by *S.* to *N*, and that, if the mortgage was paid off, then the 1450*l*, with intereſt thereon, was to be re-delivered into the hands of *S.* for the uſes of his will. Afterwards, and before the day of redemption, *S.* made his will, reciting the above memorandum, and diſpoſed of his ſhare, thereby. The lands were redeemed on the day, and the whole money and intereſt paid to *N*, *S.* being dead, and he claiming it by ſurvivorſhip. But, on a bill exhibited by his executor, the court was clearly of opinion that, by equity, there ought to be no ſurvivorſhip in a caſe of this nature; and that the note, under the hands of both the parties, and the will of *S*, ſhewed plainly that there was a truſt between them, *that*, on repayment, each of them was to have his money, with intereſt.

Petty *v.* Styward. 1 Ch. Rep. 58.

CAP. X.

How a Wife is intereſted in her Huſband's Eſtate mortgaged, and other Matters relative thereto.

Cruiſe on Fines 130.

BY the common law, a married woman could not, by joining with her huſband in any deed or conveyance whatſoever, bar herſelf of that portion of her huſband's real property, which the law hath provided for her ſupport in caſe ſhe ſurvives him. And, it was formerly held, that a married woman did not bar herſelf of her right to dower, by joining her huſband in a fine: but, the caſe is now altered in that reſpect, as it hath been long ſettled that, if a huſband and wife join in levying a fine of the huſband's eſtate, the wife is thereby barred from claiming her dower, out of the lands which are comprehended in the fine. Becauſe, ſhe having nothing in theſe lands in her own right, her joining her huſband in a fine, could be for no other purpoſe, but to bar herſelf of her dower: but a fine levied by the

Plowd. 373. 2 Rep 93. *a* 10.—49. *b*. *vid.* Glanv. lib. 2. c. 3. Ibid. 133.

the huſband alone, does not bar his wife of dower.

A woman may alſo bar herſelf of her jointure, by joining her huſband in levying a fine of it, provided it be made purſuant to the ſtatute 27. *Hen.* 8. and be a good bar of dower; becauſe, the wife, by accepting ſuch a jointure before marriage, barred herſelf of her right to dower, ſo that ſhe can claim nothing after her huſband's death, but her jointure, which ſhe herſelf concurred in deſtroying. But, if a jointure be ſettled on a woman after marriage, (in which caſe it is no bar of dower,) and ſhe joins her huſband in levying a fine of it, this will not prevent the wife from claiming dower out of any other lands, whereof her huſband was ſeiſed during the coverture; becauſe, the jointure being no bar of dower, the wife had her election on her huſband's death, either to accept of the jointure, or to claim her dower. And therefore Sir *Edward Coke* ſays, that a fine levied of her jointure before her time of election, is no bar to her right of electing dower, when her time of election does come.

1 Inſt. 36. *b.* Dyer. 358. *a.*

And, if a married woman join her huſband in a fine, it will bar her of any particular intereſt ſhe hath in lands comprehended therein,

Sed. quer. et vid. Cruiſe on fines. 135.

as well as, from claiming dower, or a jointure out of thoſe lands.

Goodrick *v.* Sherbolt. Pre. Ch. 333. Sc. by the name of Shotbolt *v.* Biſcow. Gilb. Rep. Eq. 18.

Thus, where a man, on his marriage, entered into a bond for 600*l.* to a truſtee, with a warrant of attorney to confeſs judgment thereon, to be defeazable on the payment of 300*l.* to his wife, if ſhe ſhould ſurvive him, and the wife afterwards joined the huſband in a fine of all his lands: it was reſolved, that the fine not only bound the wife from claiming dower out of the lands, but deſtroyed her intereſt in the judgment. And the Lord Keeper decreed, that the wife ſhould procure ſatisfaction to be acknowledged on the judgment.

And, as a wife may, by levying a fine, abſolutely bar herſelf of her dower or jointure; ſo may ſhe, thereby, charge or incumber her intereſt therein.

Dolin *v.* Coltman. 1 Vern. 294.

But, in ſuch caſe, where the huſband agreed that ſhe ſhould have the redemption of the mortgage; in regard the wife, in confidence of this agreement, had levied the fine, and thereby barred her dower, the huſband and wife being both living, the court decreed that, after the huſband's deceaſe, the wife, in caſe ſhe ſhould happen to ſurvive him, ſhould enjoy her dower.

But,

But, the husband having, in this case, mortgaged the estate twice more; such agreement was held fraudulent, as against the subsequent mortgagees, so far, as it intitled the wife to the whole equity of redemption. But, notwithstanding the mortgagees pressed that the decree might only be, that she should enjoy her dower notwithstanding the fine, the court thought it unreasonable to put the wife to her writ of dower, because they might convey away the estate, and she not know against whom to bring it; and, therefore, decreed the dower to her.

Notwithstanding these principles, if it appears not to have been the intention of the husband and wife, in levying a fine, to bar the wife's jointure, the fine will not affect it.

Thus, where *A*, upon his marriage, settled an annuity upon his wife, as a jointure, to be issuing out of particular lands; and, afterwards, *A.* and his wife joined in levying a fine of those lands to a mortgagee who had notice of the annuity, which was excepted in the mortgage. It appearing, that it was not the intention of the parties to destroy the annuity, the court decreed, that it should not be affected by the fine.

Solly *v.* Whitefield. Finch. Rep. 277.

Anon, Skynner 238.

So, where a jointure was ſettled upon a woman, iſſuing out of ſome houſes in *London* which were burnt down, and ſhe joined her huſband in a fine of the houſes, to create a long term for raiſing money to rebuild them, upon an agreement that ſhe ſhould have her jointure out of the reſerved rent thereof: it was adjudged, that the fine did not affect the jointure.

Bertue & Stile cited 1 Ch. Ca, 271.

If there be a jointreſs of lands mortgaged, ſhe, paying the mortgage, ſhall hold over, till ſhe and her executor ſhall be repaid, with intereſt; for, as ſhe is intitled to hold the lands diſcharged from incumbrances, ſhe ought to be reimburſed the money ſhe pays to ſet her eſtate free, and in the condition, in which it ought to have been.

Haymer *v.* Haymer. 2 Vent. 343.

And, the law is the ſame, although the ſettlement be upon articles only. Therefore, where the late huſband of the plaintiff, entered into articles with her, whereby it was agreed, that certain of his lands ſhould be ſettled before the marriage (which was then intended between them,) ſhould be ſolemnized, upon him and her, and the heirs of his body by her. He died before the ſettlement made in purſuance thereof, the lands being mortgaged to one, who had no notice of the articles. After his deceaſe, the plaintiff exhibited her bill to have them executed;

executed; and, although it was objected that, the articles being to make the settlement before marriage, the plaintiff's marrying before it was done was a waiver of the benefit of them, and, (the plaintiff being the sole party with whom they were made,) a release in law, yet, an execution of the articles was decreed against the heir at law of the husband; and, also, that the plaintiff should redeem and hold for her life, and her executors should detain the land, untill the money, that she had been out upon the redemption, was raised.

Where a mortgagee lends more money on his old security, without notice of a settlement intervening, he shall be allowed it; for, the legal estate being in him, he may protect himself thereby.

Thus, where tenant in tail demised his lands for 99 years, by way of mortgage, and afterwards married, and, in consideration thereof and of 500 *l.* portion, suffered a recovery to enable him to settle a jointure, and, then, took up more money from the mortgagee upon the former security. The jointress was plaintiff, and the question was, whether the defendant should be allowed the money lent after the recovery and marriage? And the court declared that, if the defendant had no notice of the jointure when

Goddard *v.* Complin. 1 Ch. Ca. 119.

when he lent the new money, he muſt be allowed it.

And a ſettlement of mortgaged premiſes, made after marriage, if, *merely voluntary*, is void againſt a ſecond mortgagee, although he hath *notice* thereof.

Gardiner *v.* Painter, Sel. Ca. Ch. 66.

Thus, where a man, who had mortgaged his eſtate, married, and, after marriage, made a ſettlement of the mortgaged eſtate upon his wife, which was recited to be in conſideration of a portion paid, and, *then*, mortgaged it a ſecond time. He dying, ſhe brought her bill to be let into her jointure, on payment of one third of the money due on the firſt mortgage, without being obliged to redeem the ſecond mortgagee, whom ſhe charged, as having had notice of the jointure. It appeared, that the ſecond mortgagee had notice of the jointure, at the time of the mortgage; that there were no articles previous to the ſettlement; and no money was proved to be paid after the marriage. And it was decreed, at the Rolls, that ſhe ſhould not be let into her jointure, without redeeming both; which decree was affirmed, on appeal to the Chancellor.

A wife, being a creditor by bond given before marriage, ſhall redeem her huſband's eſtate mortgaged; and the eſtates being part copyhold

copyhold will not alter the caſe. Thus, where the plaintiff's huſband, before marriage, gave her a bond to leave her 1000 *l*, if ſhe ſurvived him, and the ſame day married her; and, ſome years after, died inteſtate, leaving a freehold and copyhold eſtate, all in mortgage. The plaintiff took out adminiſtration, but, the perſonal eſtate not being near ſufficient to pay the bond, ſhe brought her bill againſt the heir and mortgagee to redeem, and be let in to have ſatisfaction of her bond. The defendant, the heir, urged, that, by the marriage, the bond became void in law, and could not be maintained in equity, eſpecially againſt him, who was chargeable only, in ſuch caſe, by being particularly named; and that, although it ſhould be ſupported as a marriage agreement in writing, yet, it could only charge the perſonal eſtate, and could not affect the copyhold. *Sed, per curia,* if the bond were executed (which, being doubtful, was ordered to be tried,) the court would ſupport it as a bond, and, the freehold and copyhold being mortgaged together, the plaintiff ſhould redeem both.

Acton *v.* Acton. Pre. Ch. 237. S. C. 2 Vern. 480.

A jointreſs of part of an eſtate mortgaged, is intitled to redeem the whole. But, if a jointreſs, after marriage, joins with her huſband in a fine, and mortgages the land, and,

Howard *v.* Harris. 1 Vern. 191. Sc. Supra 18. 98, 99. Howell *v.* Price.

Gilb.Ca. Eq. 106. 2 Ch. Ca. 100. 1 E. Ca. Abr. 316. 7.

and, then, the husband dies, there, her land is charged, and she shall pay her part towards disincumbering of it. And, in that case, her executors shall not hold the land until satisfied thereout; because, she herself concurred in the carrying on the charge, and, therefore, must join in disbursing of it according to the value of her interest, which is estimated at the rate of one third of the principal; and the jointress, unless she redeem, must keep down the interest.

If a husband lends out money on mortgage in the name of himself and his wife, and then dies, the wife is intitled to the survivorship, if there are assets sufficient to pay the debts, without this money; for, in this case, the wife is in the nature of a joint purchasor. Thus, where G's personal estate was decreed to be applied to the payment of debts and legacies in ease of his real estate, which, by his will, was made liable thereto; and his widow and executrix, now the wife of the defendant *B*, upon the account before the Master, insisted that, several mortgages and bonds, for money, lent by her husband, being taken in the name of the husband and wife, she was intitled thereto, as survivor, and that the same ought not to be brought into the account as part of the personal estate: the Master having stated that

Christ's Hosp. v. Budgin *et ux.* 2 Vern. 683.

matter

matter ſpecially, it was inſiſted, for the heirs, that the wife was but in nature of a truſtee, the money being the huſband's, which, if paid in the life-time of the huſband, would have fallen into his perſonal eſtate again, and he would not have been accountable to the wife; and that, if this ſhould not be liable to debts, the huſband, by joining his wife in the ſecurity, might defraud all his creditors: but the court decreed in favour of the defendant, againſt the heir at law.

But, in the caſe of creditors, the huſband and wife being joined in the ſecurity, would not avail *her* againſt them.

Gatley *v.* Quarrel, cited in the laſt caſe.

It was held, in the caſe of *Brown* v. *Gibbs*, that a truſt-term ſhould not be removed out of the way of a dowreſs, even, to let her claim in againſt an heir at law; and this determination was confirmed upon the firſt hearing of the caſe of *Wray* v. *Williams*, wherein this point came again under conſideration, upon a claim ſet up by a dowreſs againſt the deviſee of her huſband, who defended himſelf by a truſt-term, created originally to defend a purchaſor. The reſolutions, in both theſe caſes, were founded upon the determination in *Lady Radnor*'s caſe, which was very different in its circumſtances; *that*, being the caſe of *a purchaſor*, for

Brown *v.* Gibbs. Prec. Ch. 97. Mich. 1699.

Wray *v.* Williams. Pre. Ch. 151. Sc. 1 Will. 137. 28 June 1700.

Lady Radnor's caſe. Pre. Ch. 65. Mich. 1694. Sc. 1 Vernnon 356. 2 Ch. Ca. 172.

and in Eq. Ca. Abr. 219. by the name of Bodmin v. Vanderbendy.

for valuable conſideration, of an eſtate, whereof there was a term for 99 years ſtanding out, created for the performance of ſeveral truſts, and afterwards to attend the inheritance; by aſſigning over of which, the huſband had a power to bar his wife of dower; and which ſtep he *had* taken, to ſecure the purchaſor.

But, the injuſtice of theſe deciſions in favor of the heir at law and deviſee, (the latter of whom was a mere volunteer,) againſt a dowreſs, whoſe title is particularly favoured in law, (eſpecially where the contrary was held reſpecting a jointreſs, who was conſidered as a purchaſor) could not long eſcape the obſervation of the court; more eſpecially, as they were made expreſsly upon the authority of a caſe, the circumſtances of which were totally different. Accordingly, this doctrine was reviſed, and the contrary determined in a ſeries of deciſions.

Hitchin v. Hitchin. Pre. Ch. 133. Mich. 1700.

Thus, in the caſe of *Hitchin* v. *Hitchin*, where *H*, the plaintiff's grandfather, made a mortgage for 500 years, (which was ſatisfied, and, after his death, aſſigned to *S.* his relict, who was entitled to dower of his eſtate,) and then died, leaving the plaintiff's father his ſon and heir; who, being indebted, made his will, and thereby deviſed

viſed lands to his wife *L*, but did not mention the deviſe to be in ſatisfaction of her dower, and deviſed the reſidue of his eſtates unto his executors, until his debts paid. *L.* brought her writ of dower and recovered; then the heir brought his bill to be relieved againſt the recovery, and ſhe brought her bill for a diſcovery and to ſet the term out of the way: and it was decreed, that the dowreſs ſhould be relieved againſt a ſatiſfied mortgage term.

Banks *v.* Sutton. 2 Will. 632.

The caſe of a ſatisfied, or unſatisfied, mortgage term, ſeems to differ, only, in this; that, in the one, the court gives the dowreſs relief abſolutely, in the other, upon terms of keeping down a third of the intereſt, or, paying a third of the principal: but, as to the mortgagee, the dowreſs muſt pay the whole money, and hold over for the reſidue.

Williams *v.* Wray. 1 Will. 137. Hill. 1710. Hyford *v.* Hyford. 1 Eq. Ca. Abr. 219. 5. Eaſter. 1710. *Sed vid.* 2 Will. 639. where this caſe is ſaid to have been determined in Eaſter 1711.

This latter reſolution, as to truſt terms, was further ſettled, upon a bill of review brought upon the caſe of *Williams* v. *Wray*, in which, Lord Keeper *Wright*'s decree was reverſed; and, alſo, in the caſe of *Hyford* v. *Hyford*; both of which reſolutions were made by Lord Keeper *Harcourt*, and firmly eſtabliſhed the law, that *a dowreſs having recovered, at law, a truſt term ſet up, ſhould not ſtand in her way, in equity.*

So,

Dudley *v.* Dudley. Pre. Ch. 241. Sc. 1 Eq. Ca. Abr. 219. 5. Eaſter 1711.

So, in the caſe of *Dudley v. Dudley*, it was held, that a truſt-term, attending upon the inheritance, ſhould be removed, in favour of a dowreſs againſt an heir at law. Hardreſs 489.

1 Atk. 606.

But, a wife is not intitled to dower, out of the equity of redemption of a mortgage in fee.

This diſtinction, between a mortgage in fee and a mortgage for a term of years, appears to have taken its riſe from the equity of redemption of the former, having been conſidered as analogous to a *pure* truſt; of which, it was formerly, and is now, generally underſtood dower cannot be; as well, becauſe, in ſuch caſe, there is no ſeizin by the huſband, which, at law, is neceſſary to conſummate the title of dower in the wife, as that, by the preamble to the ſtatute of uſes, it was recited that, by means of uſes, the wife was defeated of her dower, from whence, it appeared, that the wife of *ceſtui que uſe* was not dowable at common law; and, if ſo, then the concluſion neceſſarily followed that, as, an uſe at common law, was the ſame as a truſt ſince the ſtatute, the wife could no more be endowed of a truſt, ſince the ſtatute, than, at common law, and before the ſtatute, ſhe could of an uſe. And, as the analogy to uſes had great weight,

weight, originally, in eſtabliſhing this rule as to truſt-eſtates; ſo, the common practice of conveyancers, founded thereupon, of placing the legal eſtate in truſtees on purpoſe to prevent dower, (which made the letting in that claim upon truſts, contrary to former opinions, of dangerous conſequence to old titles,) rendered the courts of law very jealous of breaking in upon this rule; it having been thought ſafer to abide ſtrictly by the rule of law, *even* in caſes where the reaſon of it did not apply, *than*, to ſhake the foundation of ancient titles, by permitting nice and curious exceptions to be made to the general rule.

Therefore, although this rule of law, as to a dowreſs claiming dower out of the equity of redemption of a mortgage in fee, was attempted to be broke through in the caſe of *Banks* v. *Sutton*; in which caſe, this doctrine was gone into by Sir *Joſeph Jekyl*, Maſter of the Rolls, in a learned and elaborate argument, and it was reſolved, that a woman was intitled to dower out of the equity of redemption of a mortgage in fee. Yet, in a later caſe, in which this queſtion came before the Lords Commiſſioners of the great ſeal, that deciſion of Sir *Joſeph Jekyl* was over-ruled, and the reſolution in the caſe of *Banks* and *Sutton*, as to this point, taken *as a general poſition*, held not to be law.

Banks *v.* Sutton. 2 Will. 632.

Dixon, Widow *v.* Sir Geo. Saville *et al.* 7 Nov. 1783.

The caſe, I allude to, was that of *Dixon* widow of *Abraham Dixon* againſt Sir *George Saville* and others, which came on to be heard, upon bill and anſwer, the 7th *November* 1783. The circumſtances were as follow; *Abraham Dixon*, being in his life time and at his death ſeized in fee of eſtates in the county of *Northumberland* of the yearly value of 3000*l*, and upwards, died in 1782, without iſſue, leaving *Anne Dixon*, the plaintiff, his widow. *Abraham Dixon*, by his will, dated 3d *January* in the ſame year, deviſed his real eſtates &c. to the defendants Sir *George Saville*, *William Orde* and *Thomas Adams*, their heirs and aſſigns, upon truſts in his will mentioned, and, ſubject thereto, to his great nephew *Arthur Onſlow*, his heirs and aſſigns, for ever.

The teſtator not having, in his life time, made any ſettlement or other proviſion for his wife in lieu or bar of dower; ſhe, not having done any act to bar herſelf thereof, filed her bill againſt the truſtees, ſtating the above facts, claiming dower out of all the teſtator's real eſtate, and praying to be let in to the receipt of one third part of the rent and profits thereof.

To this bill, the truſtees and infant put in their anſwer, ſetting forth, that the teſtator, being ſeized of theſe premiſes, had borrowed

borrowed a large ſum of money upon mortgage, and, for ſecuring the re-payment thereof with intereſt, had, previous to his marriage with the plaintiff, conveyed the premiſes unto the mortgagee *in fee*, ſubject to a proviſo for redemption, on re-payment of the money with intereſt; that (the legal eſtate in the premiſes being, by this mortgage, abſolutely veſted in the mortgagee previous to, and at the time of, the intermarriage of the teſtator with the plaintiff, and not being at any time, afterwards, re-conveyed to him, but remaining veſted in the mortgagee at the time of his death, and he being therefore only intitled to the equity of redemption thereof at the time of his intermarriage, and, at all times thereafter until the time of his death,) the plaintiff was not at any time dowable in, or out of, the ſaid premiſes or any part thereof; nor was intitled to claim, either at law, or in equity, any dower or thirds therein.

On the hearing, the plaintiff could have proved, by witneſſes, that the teſtator, her huſband, underſtood and declared that, after his death, his widow would be intitled to dower out of his real eſtates; and, that he made his will under that idea, could have been proved, if admiſſible, by the perſon who drew it, Mr. *Dixon* having put the queſtion to him, whether Mrs. *Dixon* would

not be intitled to her dower, to which he, being at that time ignorant of the mortgage, anſwered, that ſhe certainly would. Indeed the will itſelf ſufficiently ſpoke the idea; for, *Dixon*, thereby, bequeathed to the plaintiff, by the name of his dear wife *Anne Dixon*, his coach and harneſs and a pair of horſes, together with as much of his plate as ſhe ſhould think proper, not exceeding the ſum of 60*l*; which things ſhe could have no occaſion for, if ſhe had not a jointure to ſupport her.

If the queſtion was loſt, Mrs. *Dixon* was left totally deſtitute of any proviſion.

The claim of the widow was ſupported on three grounds.

Firſt, the general law.

Secondly, the diſtinction between a mere truſt and an equity of redemption, and,

Thirdly, the authorities in favour of dower under circumſtances, not more favourable than thoſe attending this caſe.

Under the firſt of theſe heads, it was obſerved, that dower was a right of the firſt attention and moſt ſacred preſervation at the common law; it was a right not only

founded in our law, but a right conſonant to the firſt principles or laws of morality and equity, as ſpringing from the moral obligation a man was under to make a proviſion for his wife. And we accordingly found it, in a variety of caſes, aided and extended beyond its ſtrict *legal limits*, by the interpoſition of our courts of equity, in removing truſt-terms and other obſtructions to it, in certain caſes, which would ſtand in the way of it at common law. This proved it to be a right not merely confined to our common law, but, a right recognized, protected and aided *in equity*; and which, ſo far as it was the ſubject of relief in equity, muſt be conſidered as an equitable right. This was the predicament in which it ſtood in the caſes of *Dudley & Dudley*, *Hyford & Hyford*, *Wray* and *Williams*, and the other caſes, wherein it had been decided, that a dowreſs ſhould have the benefit of a truſt-term attendant on the inheritance, as againſt the heir. Conſidering it, therefore, as an *equitable right*, it well might be a wonder, how it came about, that a widow ſhould not be intitled againſt the heir to dower of an equitable inhetance. Some, indeed, had confined the rule of her not being ſo, to the caſes where the truſt was created by the huſband himſelf; this was the opinion of the Maſter of the Rolls in *Banks & Sutton*; however this opi-

Supra. 287, 288.

Supra. 289.

nion had been over-ruled, and it ſeemed to be a ſettled point, that a widow was not dowable of a direct proper truſt.

This naturally lead to the ſecond head of argument, in favour of the widow; namely, the diſtinction between a *mere truſt*, that was, an uſe, as it was ſtiled at common law, and, *an equity of redemption*; the former was regarded, at common law, as quite a diſtinct intereſt from the legal eſtate, to which the right of dower was annexed. It, of courſe, did not involve in it that right; if it had, there would have been two oppoſite rights of dower in the ſame lands at the ſame time; as the widows of both the *truſtee* and of the *ceſtui que uſe* would have been intitled to dower. For, the widow of the truſtee was clearly intitled at common law; and, when the court of chancery interpoſed to prevent the *legal* title of the widow of the truſtee, it ſeemed extraordinary that it did not, in its place, ſubſtitute an *equitable* one of the widow of the *ceſtui que truſt*. But however, theſe ſorts of truſt being the *creatures* of the parties themſelves, whatever were the legal incidents or privileges they wanted, might have been ſuppoſed to have been *voluntarily* relinquiſhed and abandoned, by the parties creating thoſe truſts. But, it was otherwiſe in regard to an "*equity of redemption*," that

was

was not any intereſt created or reſerved, by, or, between the parties, beyond the expreſs time of redemption; it was a mere creature of a court of equity itſelf, founded on this principle, that, as a mortgage was originally nothing more than a pledge or ſecurity to the mortgagee for his money, it was but natural juſtice between man and man, to conſider the original ownerſhip of the lands as ſtill reſiding in the mortgagor, ſubject only to the *legal title* of the mortgagee, *ſo far* as ſuch legal title was requiſite to the end of his ſecurity; and, accordingly, the title of the mortgagee, was not treated, by equity, as any title beyond that point. His *beneficial* intereſt, though the mortgage was in fee, was conſidered only as perſonal eſtate; he was not permitted to grant leaſes or exerciſe any other act of ownerſhip, to the prejudice of the mortgagor, to whom he was even accountable for the profits of his eſtate. His widow was not permitted to claim dower, nor could he, or, thoſe claiming under him, avail themſelves of ſeveral other privileges and incidents, attending real property. It ſeemed to be the regular conſequence of the doctrine adopted by our courts of equity, in regard to mortgages, by conſidering them ſtrictly and merely in the nature of *ſecurities* for the mortgage-money, and in-

titling the mortgagee to no other of the incidents or privileges of ownerſhip in the lands, than what was requiſite for the end of ſuch ſecurity; that all ſuch privileges and incidents of ownerſhip of the lands, as were not conſidered as becoming veſted in the mortgagee for the purpoſe of his ſecurity, and the exerciſe and enjoyment whereof could not be prejudicial to, or inconſiſtent with, that ſecurity, ſhould be held to remain in the mortgagor; or, in other words, that he ſhould, to all purpoſes not prejudicial to the mortgagee, be conſidered as the complete owner of the mortgaged lands. And, accordingly, this was found to be the eſtabliſhed doctrine in ſeveral inſtances, when only *volunteers* were intereſted, ſuch as revocations under powers, and revocations of deviſes; as in the caſes of *Thorn* v. *Thorn* and *Hall* and *Dunch*, and other like caſes. That, in the caſe of *Lincoln* and *Rolle*, Parliament Caſes 156, the doctrine was expreſsly recognized and admitted on both ſides; becauſe, that, in equity, a mortgage did not make the eſtate anothers, and becauſe, a mortgage was *not an inheritance*, but a *perſonal eſtate*; and there ſeemed no reaſon in the world why theſe general incidents of complete ownerſhip ſhould be ſaved in favour of a deviſee or other volunteer, and not in favour of a wife, whoſe claim of dower ſtood upon the ſtrong-

Supra. 13.

eſt

eſt grounds of moral and equitable right; and who was, in many inſtances, conſidered as intitled to relief in equity, in regard to an intended proviſion, when a deviſee or other mere volunteer was not. And, agreeable to this doctrine, was the deciſion in the caſe of *Banks* and *Sutton*, where it was decreed in favour of the claim of dower, out of an equity of redemption of a mortgage in fee; which deciſion was founded on a variety of authorities and reaſons delivered by the Maſter of the Rolls, all which were equally forcible in the preſent caſe. That the caſe of *Banks* and *Sutton* was directly in point to the preſent queſtion, for, though the Maſter of the Rolls would not take upon himſelf to determine the queſtion, in regard to the dower out of a *mere truſt*, created, not by the huſband, but, by ſome other perſon, with no time limited for conveying the legal eſtate; and avoided this point, by ſhifting his ground, to that of the huſband's being intitled, under the expreſs direction of the will under which he claimed, to have the eſtate conveyed to him at the age of twenty one; which circumſtance, under the application of a common principle of equity, of *conſidering that as done, which ought to have been done*, of courſe, in equity, let the widow in, to the ſame degree of title, as ſhe would have had, if the truſtees had conveyed the eſtate to her huſband at the time

time directed: yet, as there was a mortgage in fee prior to the deviſe, the other point of the right of dower, *out of ſuch equity of redemption*, ſtill ſubſiſted, independant of the conſtructive, or aſſumed, conveyance by the truſtees, at the time directed. And, as the principle on which the Maſter of the Rolls got rid of the firſt point did not apply to this, he, accordingly, found himſelf conſtrained, inſtead of changing his ground as before, to enter into a ſtrict examination of it, and meet the objections to dower with authorities, inferences, and general reaſoning, and, through them, to come to a profeſſed deciſion of the point; as he expreſsly did, when he ſaid, "he did not know, or could find, any inſtance where dower of an equity of redemption was controverted and adjudged againſt the dowreſs"; and, as there were authorities in caſes leſs favorable, he therefore declared, that the widow of the perſon, intitled to the equity of redemption of the mortgage in queſtion, *which was a mortgage in fee*, had a right of redemption; and decreed her the arrears of her dower from the death of her huſband, ſhe allowing the third of the intereſt of the mortgage-money unſatisfied at that time: that an authority more directly in point than this was, could not be expected. And, though the ſubſequent caſe of the Attorney General againſt *Scott*, (before Lord *Talbot*) in which the widow was denied dower, was generally

Attorney General *v.* Scott. Ca. temp. Talbot 138.

generally conſidered as an authority contrary to, and ſuperſeding, that of *Banks* and *Sutton*; yet, ſuch a concluſion ſeemed too haſty, as the two caſes appeared to differ materially; for, in that of the Attorney General and *Scott*, although there was a mortgage, yet the queſtion did not turn upon that; becauſe the legal eſtate was outſtanding in truſtees, in whom it was veſted antecedent to ſuch mortgage; and conſequently, the deciſion, in that caſe, was on a direct proper truſt, and not on a mere equity of redemption. And the difference, between a *direct truſt* and *an equity of redemption*, and between the claim of a widow, and that of a deviſee or mere volunteer, was ſtrongly inſiſted upon; and the diſtinction, between this caſe, and that of a claim of dower againſt a purchaſor, fully enforced.

But the Lords Commiſſioners ſaid, that the caſe of an eſtate by the curteſy in a truſt was the anomalous caſe, not the rule, that the wife ſhould not have dower: and that this point was ſo much ſettled that it would be wrong to diſcuſs it much; and the bill was diſmiſſed, but without coſts, *the defendants not praying them.*

However it is neceſſary here to remark, that there were ſome circumſtances, which diſtinguiſhed

diſtinguiſhed the caſe of *Banks* and *Sutton* from this of *Dixſon* and *Saville*; particularly that, in the former caſe, the mortgage was made by the anceſtor of the huſband whoſe widow claimed dower, and the eſtate came to him, by deviſe, ſubject thereto; alſo, that the teſtator ſeemed to have intended, that the mortgage ſhould be paid off out of his perſonal eſtate, and the rents and profits of the real eſtate, which would accrue before the deviſee attained his age of twenty one; at which time, a moiety of the legal eſtate was, poſitively, directed to be conveyed to him. For, although the former circumſtance of the mortgage deſcending, does not appear to me to afford any argument of conſiderable weight in favour of the dowreſs, becauſe, the only inference that could be drawn from that circumſtance would be, that the mortgage being made by the anceſtor, and not by the huſband, it could not be concluded that there was any intention in the huſband to make the mortgage a means of depriving the wife of dower; (which was a diſtinction, that had been attempted to be made, in caſes when the wife claimed dower of truſts, between truſts deſcending and truſts made by the huſband,) but, which inference could not be applied to the caſe of a mortgage; becauſe, whether that deſcended to, or was made by, the huſband, the intention with

which

which it was made was obviouſly with a view to raiſe money, only, and could not, by any argument, be made to ſupply an inference, that it was done with a view to prevent dower; yet, the latter circumſtance might perhaps be conſidered as deſerving more weight; for, if the truſtee, who was himſelf the mortgagee, by miſapplying the perſonal eſtate of the teſtator and the rents and profits of his real eſtate, was himſelf the cauſe of the mortgage ſtanding out, and made this a reaſon to hold back the conveyance of the legal eſtate, according to the directions of the teſtator; there ſeems as much reaſon for the application of the rule of equity, of *conſidering that as done* which *ought to be done*, in order to let in the widow, in equity, to the ſame degree of title, *notwithſtanding the mortgage*, as ſhe would have had, if the truſtee had conveyed the eſtate to the huſband at the time directed, as there was for the application of it for that purpoſe, *notwithſtanding the truſt*.

And it is obſervable that, in this point of view, the caſes of *Banks* and *Sutton* and *Dixſon* and Sir *George Saville* are perfectly reconcileable and may ſtand together, the former, being conſidered as eſtabliſhing the general principle of law, that the wife of one entitled to an equity of redemption of a mortgage in fee, ſhall not be intitled to dower out of ſuch eſtate, the latter, as an

exception

exception to that general rule, as falling under another and distinct principle of equity. *Sed quære.*

Otway *v.* Hudson. 2 Vern. 583.

And, that there may be exceptions to this rule, as to trusts, is evinced by the resolution in the case of *Otway* and *Hudson*; in which case, tenant in tail of the trust of a copyhold estate, having desired the lord to admit him, and being refused, and having brought a bill against the trustees to have a surrender made him of the legal estate, died, *pending the suit*; and, although the husband was never seized of the legal estate of the copyhold, yet, the widow was decreed her free bench. Which was a decision contrary to the rule laid down in the principal case, but, founded upon an equity raised in favour of the wife; because of the great and obstinate delay of the trustee, who refused, and stood out a bill requiring him, to convey.

Litt. Sec. 357.

It was formerly a doubt whether, upon a mortgage in fee, the estate mortgaged did not become liable to the dower of the wife of the mortgagee, which occasioned the introduction of large terms for years by way of mortgage, with condition to be void, upon re-payment of the mortgage-money; but that doubt hath been long since overruled, in our courts of equity, and it is now clearly settled, that *an equity of redemption* is not liable to the dower of the wife of the mortgagee.

Black. Comm. 158.

Hard. 466. Cro. Car. 190, 1.

CAP. XI.

Of Mortgages made by the Husband and Wife of the Wife's Freehold, and his Interest in Mortgage Money due to her.

AS the husband, by virtue of his marriage, obtains no other interest in his wife's estates of inheritance, than an estate of freehold, in her right, for their joint lives, in case there be no issue of the marriage, and for his life, as tenant by the curtesy, if there be; it follows, of course, that he alone cannot make a valid mortgage thereof, to be binding upon her and her heirs, for any longer period. And, therefore, where one, seised in fee, in right of his wife, of a share of the *New River* water, joined with her, and made a mortgage, by way of lease for 1000 years reserving a pepper corn rent, by deed without fine, and died; a bill brought by the mortgagee to foreclose, was dismissed by the Master of the Rolls, saying, that a fine might be, and usually was, levied, of

Co. Litt. 351. *a.*

Bryan *v.* Woolley. 4 Vin. Abr. 57. pl. 19. Drybutter *v.* Bartholomew 2 Will. 127.

of *New River* ſhares, and, in this caſe, there ought to have been one, it being the inheritance of the wife; and that, this having been omitted and the leaſe expiring by the death of the huſband, the mortgage was alſo thereby determined, and nothing remained to foreclose.

But, if the wife joins in a mortgage of her lands and levies a fine thereof, this will be binding upon her and her heirs notwithſtanding the coverture. For, as by ſuch proceſs, ſhe may make an abſolute alienation of her real eſtate, ſo may ſhe make a conditional one thereof.

Penne *v.* Peacock *et ux.* Ca. temp. Talbot 41.

And a fine, levied by a feme covert, will make a mortgage of her truſt, as well as of her legal, eſtate, valid. Thus, where the defendant *P.* before her marriage, conveyed, with her intended and after huſband's privity, the premiſes in queſtion to truſtees, in truſt, to pay the rents and profits to her ſole and ſeparate uſe for her life, and, after her deceaſe, in truſt, for ſuch uſes as ſhe, whether ſole or covert, ſhould by her laſt will limit and appoint, and, for want of ſuch appointment, then to her own right heirs for ever. Afterwards, ſhe mortgaged part of the lands to the plaintiff for a term of five hundred years, to ſecure the ſum of 1000 *l*, and a fine was levied by huſband and

and wife, who both declared the uſes, as to the mortgaged premiſes, to be to the plaintiff for ſecuring the principal and intereſt. On a bill exhibited, the wife, by order of court, anſwered ſeparately; inſiſting, as to this point, that, the legal eſtate being in the truſtees, the parties to the fine, had not ſuch an eſtate therein whereof a fine could be levied to bar her right. But, the Lord Chancellor, as to this objection, obſerved, it was very well known that the operation of fines and recoveries were the ſame upon truſts, as upon legal eſtates, and, if ſo, it muſt inevitably follow, that an eſtate for life limited to the wife, remainder to her own right heirs in default of any appointment made by her laſt will, was diſpoſed of by the fine; and, if no ſuch remainder had been limited by it, yet, as the eſtate was the wife's, and moved originally from her, whatever was not conveyed would have remained in her, and conſequently been barred: and his Lordſhip decreed the truſtees to convey to the plaintiffs the mortgagees.

But, a covenant from the huſband and wife, that he and his wife will levy a fine, will not be binding upon her, in caſe of his death. Therefore, where one ſeiſed in tail, for valuable conſideration, bargained and ſold to another in fee, covenanting, that he

Hody v. Lun. 1 Roll. Abr. 375.

Mich. 5. Car. 1. Sc. 1 Eq. Ca. Abr. 61. 2.

and his wife would levy a fine for better aſſurance; and it was agreed that, 30 *l.* part of the conſideration money ſhould be paid unto the wife upon the conuſance thereof. A fine was accordingly acknowledged by them before a judge on the circuit in the vacation, and the 30*l.* paid her, the huſband being ſick in bed; and afterwards, and before the enſuing term, he died; whereupon the wife ſtopped paſſing the fine, and brought a writ of dower. It was held the bargainee had no remedy againſt the dowreſs, becauſe it was contrary to a maxim in law, *that a feme covert ſhould be bound without a fine.*

Baker *v.* Child. 2 Vern. 61.

Yet, in a ſhort note of the caſe of *Baker* v. *Child,* it is ſaid to have been determined that, where a feme covert, by agreement made with her huſband, was to ſurrender or levy a fine, the court would, by decree, compel her to performance thereof, although the huſband died before it was done.

1 Eq. Ca. Abr. 62. Note *a.*

But, Mr. *Murray* obſerved, in the caſe of *Thayer* and *Gould* before Lord Chancellor, *Mich.* 13 *Geo.* 2. that, upon looking into the regiſter's minutes, it appeared the court made no decree in the laſt caſe, but that it was, by conſent, referred to Mr. *Serjeant Rawlinſon* for his arbitration.

From this reference, however, we may fairly conclude, that there were circumſtances

in this caſe, which rendered the deciſion of it doubtful at leaſt; as, had it been clear that the court would have releaſed the wife from the agreement, ſhe certainly never would have ſubmitted to an arbitration.

But, although, during coverture, any alienation of the wife's eſtate of inheritance, either by the wife alone, or by the huſband and wife, without a fine levied thereof, be void after his death; yet, a wife may, by any acts done by her which amount in law to a *new grant or a re-execution*, give it validity. Thus, where a mortgage, in the form of a leaſe, had been granted of a feme covert's eſtate by the huſband and wife, and after the huſband's death, the deed being in the hands of the mortgagee, the wife had directed the tenants in poſſeſſion to attorn to the mortgagee, had ſettled with him for the balance of the rents, ſtiling him mortgagee, and had not queſtioned his poſſeſſion for a number of years; the Court of King's Bench were all of opinion, that the conveyance, in this caſe, though in the form of a leaſe, was, in ſubſtance, a mortgage; and, not being within the reaſon for which leaſes by a feme covert were held to be only voidable, was abſolutely void on the death of the huſband; but, that the acts done by the widow, the deed being in the poſſeſſion of the mort-

Carter *v.* Strathan. Doug. Rep. 53. Note 17. *et vid.* Perkins ſec. 154. Drybutter *v.* Bartholomew 2 Will. 127. Supra 303.

gagee, were tantamount to a re-delivery, which, without a re-execution, was equivalent to a new grant.

If a feme covert join in levying a fine to ſecure a mortgage on her eſtate, which mortgage afterwards becomes forfeited; ſhe will not only be liable to the payment of the original ſum borrowed, but, if part of that ſum be paid off, and then a further ſum taken up, that debt will alſo attach upon the eſtate.

Reaſon *v.* Sacheverell. 1 Vern. 41.

Thus, where baron and feme, having occaſion to raiſe 400*l*, levied a fine of the wife's land and made a mortgage for the ſame; and, after the mortgage was *forfeited*, the huſband paid in part of the mortgage money, and then borrowed as much money more of the mortgagee as he had paid in before: it was decreed that the mortgagee, having the eſtate at law in him by the forfeiture of the mortgage, ſhould hold the land againſt the heir of the wife until the whole money was paid; and that, if the heir would not pay in the whole principal, intereſt, and coſts, he ſhould be foreclоſed.

2 Ch. Ca. 98.

But, in another report of this caſe, it is ſaid that the firſt money paid off, *viz.* the

the 200 *l*, was indorſed on the mortgage deed, and that the wife, in preſence of the huſband, made account of what was due on the firſt and ſecond loan, both being, by agreement, lent on ſecurity of the mortgage.

However, I apprehend, it would make no difference, in this caſe, whether the wife aſſented or not; becauſe, the eſtate, on forfeiture, becoming abſolute in the conuſee, he might thereby protect himſelf; for, he had good title in law, and, as much equity to have the money as the heir of the wife had to have the land.

If the huſband borrows money on mortgage of the wife's land, his perſonal eſtate ſhall be firſt applied in diſcharge thereof, although ſhe hath levied a fine; for, the mortgage being originally the debt of the huſband, the wife, by conſenting to charge her lands with it, does not make it leſs ſo than it was before.

As, where a huſband, ſeiſed in right of his wife, borrowed 500 *l*, to ſupply *his* occaſions; for ſecuring which, he and his wife levied a fine of her inheritance, and raiſed a term of 500 years, that was limited to the perſon lending the money with remainder to the wife in fee, to be void nevertheleſs

Tate *v.* Auſtin. 1 Will. 264. Sc. 2 Vern. 689.

theleſs upon payment of the money borrowed with intereſt; in the deed, the huſband covenanted to pay it off. Afterwards the huſband made his will, by which he gave ſeveral charities out of his perſonal eſtate, and then died, without having diſcharged the mortgage, indebted by ſimple contract. The aſſets not being ſufficient to pay the mortgage money, and alſo the charities given by the will, the widow exhibited her bill, to have the former diſcharged out of her huſband's perſonal eſtate. And ſo it was decreed; for, his perſonal eſtate would be liable to pay debts, before legacies though left to a charity, they being ſtill but legacies.

Vague words, in a ſubſequent aſſignment, importing an aſſent from the wife, that, on redemption, the eſtate ſhould be re-aſſigned in ſuch manner as either the huſband or wife ſhould appoint, will not alter the nature of the debt, or carry the eſtate to the huſband.

Coun. Huntingdon *v.* Counteſs of Huntingdon 2 Vern. 437. 1 Eq. Ca. Abr. 62. Ca. 4. Viner. Vol. 4. p. 69.

Thus, where *Theophilus* earl of *Huntingdon* and the counteſs *Elizabeth* his firſt wife, mother of the plaintiff, on the 1ſt of *Auguſt* 1682, joined in a mortgage of her inheritance for 4500 *l.* to ſupply his Lordſhip with money to pay for the place of captain of the band of penſioners, and, ſubject to

the

the mortgage which was for a term of years, the eſtate was ſettled to counteſs *Elizabeth* for life, remainder to the plaintiff her ſon in tail, with a covenant in the deed by the late earl to pay the money, and a proviſo that, on payment thereof, the term ſhould ceaſe; and on the 5th of the ſame month, the earl, by letter, thanked the counteſs for having ſealed the mortgage, and added, that the profits of the office ſhould be religiouſly applied to pay off the incumbrances. The mortgage was ſeveral times aſſigned, and particularly in 1683, when, the counteſs joined in the aſſignment; and then, the proviſo was, that, on payment of the money by them, or either of them, the term was to be aſſigned, as they, or either of them, ſhould direct or appoint. When money came in, the earl paid off the mortgage, and took an aſſignment thereof in truſt for himſelf; afterwards the counteſs died, and he married a ſecond wife, one of the defendants, and he died, having, by will, deviſed his perſonal eſtate, together with the benefit of this mortgage to a truſtee, in truſt, for younger children, which he had by his ſecond wife.

Ca. 9. vol. 10. p. 345. Ca. 17. 1 Brown's Parl. Ca. 1.

On a bill exhibited by his ſon by the firſt wife, claiming, as her heir, to have the mortgage aſſigned to him, the Lord Keeper *Wright* refuſed to make ſuch decree, unleſs,

upon the uſual terms of redemption, on payment of principal, intereſt and coſts, diſcounting profits. But, this was reverſed, upon appeal to the Lords in parliament, and an aſſignment decreed, peremptorily, to the plaintiff.

2 Ch. Ca. 161. If a wife joins her huſband, in a fine of her jointure, in order to a mortgage or ſecurity, although there be no agreement that ſhe ſhall redeem, yet, ſhe is not conſidered in Chancery as abſolutely parting with her intereſt; but, there reſults a truſt for her, to have her eſtate again when the incumbrance is paid off, as if it had been a mortgage on condition, and the money paid at the day.

2 Atk. 384. And, if a huſband hath a mortgage upon his eſtate, and his wife joins with him in charging her own to diſencumber it, and then he dies, ſhe ſurviving; though her eſtate be liable, as to the mortgagee, yet, as to the huſband, it will be looked upon, in the Court of Chancery, only as a pledge, and ſhe will be intitled to ſtand in the place of the mortgagee, and to be ſatisfied out of the huſband's aſſets.

Where a feme covert, being a jointreſs, created a term for years out of her eſtate for life, it was held, the reverſion, veſting in

in her, would attract the redemption. Thus, where the defendant, having a jointure of one hundred pounds *per annum* out of ſome houſes in *London*, which were burnt down, joined with her huſband in borrowing 1500*l.* to build upon the ground; and, to ſecure the ſame, levied a fine *ſur conceſſit* for 99 years if ſhe lived ſo long, and a deed was afterwards made between the conuſee and the huſband, wherein the huſband covenanted to repay the mortgage money with intereſt, and the equity of redemption was limited to the huſband and his heirs, but the wife was no party thereto; the huſband, having expended three or four thouſand pounds in building upon this ground, died; and the queſtion was, whether the jointreſs, or the heir of the huſband, ſhould redeem? And it was decreed in favour of the former, for that the wife was no party to the deed of re-demiſe, by which the redemption was limited to the huſband, and the wife being a jointreſs, and having granted a term for years only out of her eſtate for life, there veſted a reverſion in her, which naturally attracted the redemption.

Brend. *v.* Brend. 1 Vern. 213.

But, in this caſe, as reported by the name of *Brond* and *Brond.* 2 *Ch. Ca.* 98, it is ſtated, that there was an agreement, that ſhe ſhould not be prejudiced, but ſhould redeem, paying the intereſt of the money bor-

Brond *v.* Brond. 2 Ch. Ca. 98.

borrowed; and that the court reſolved, that the wife, having ſuffered the repreſentatives of the huſband to remain in poſſeſſion and pay off his debts, without exhibiting her claim for a long period of time, ſhould not be allowed any profits received by the huſband's repreſentatives, but from the time of the bill exhibited, which was the firſt notice, to them, of ſuch agreement.

If a woman, intitled to a mortgage, marry, and, thereupon, the huſband, in conſideration of her fortune, make a ſettlement of his own eſtate upon her; although there be no particular agreement for the purpoſe, yet he will be conſidered as a purchaſor thereof; and, if he die, ſhe living, it will go to his executors, and will not ſurvive to her.

Blois & Martin Exs. of Lord Hereford *v.* Lady Hereford. 2 Vern. 501. Sc. 1 Eq. Ca. Abr. 68. 4.

Thus, where on the marriage treaty of lord *Hereford* with the defendant his lady, they being both infants, an act of parliament was procured for ſettling a jointure in bar of dower, wherein it was provided that, if ſhe, when of age, did not ſettle her lands, part of the jointure ſhould ceaſe, and nothing was ſaid as to the perſonal eſtate; but, upon the treaty, inquiry was made what was her portion or fortune, and a particular given in of what her perſonal eſtate amounted to, wherein, *(inter alia)* mention

was

was made of a mortgage for 1300*l.* taken in lady *Bacon's* name. Lady *Bacon* dying, made her three daughters executrixes, and their husbands gave a declaration of trust that half belonged to lady *Hare*, and half to lord *Viscount Hereford*. A settlement was made by the defendant, after she came of age, pursuant to the marriage agreement, and then lord *Hereford* died, having made the plaintiffs his executors. The question was, whether this money should go to the plaintiffs, or, should survive to the wife as a chose in action? The Lord Keeper, in determining, observed, that he laid no stress upon the declaration of trust; putting that out of the case, the law of the court would presume a promise; and, in all cases, where there was a settlement equivalent, it would be intended the husband was to have the portion: the wife would not be permitted to have her fortune and jointure both; and the rather, in this case, because it was a trust and the husband could not come at it, so as to alter the property, without the assistance of a court of equity; and the defendant was condemned in costs.

But, if the settlement be expressly made in consideration of *part* of the wife's property *only*, *that* will destroy the presumption that it was made in contemplation of the *whole* of her fortune; and, in such case, I apprehend, what is not specifically conveyed

conveyed to the husband will survive to the wife.

Cleland *v.* Cleland. Pr. Chan. 63. Sc. 1 Eq. Ca. Abr. 70. 14.

So, where, on the marriage of the plaintiff's father with the defendant, who had a portion of 300 *l.* in her brother's hands secured by his bond, a farm was settled upon the defendant for her jointure, expressly in consideration of 100 *l.* paid for her marriage portion; the husband afterwards dying indebted by bonds, wherein, he and his heirs were bound, and actions being brought thereupon against the plaintiff, as his heir, to subject the real estate descended to the payment thereof, he exhibited his bill to have the remaining 200 *l.* of the portion, which was unpaid, applied in discharge of the debts. It was pretended by the defendant that there was but 100 *l.* of her portion to be paid, and that it was agreed by her husband and herself, before marriage, that the remaining 200 *l.* should be hers; and besides, that her husband being dead, and this being a debt to her, not disposed of, it did by law belong to her. But, for the plaintiff, it was said to have been expressly agreed before the marriage, that the remaining 200 *l.* of her portion should be applied to pay the husbands debts, if there was occasion. Neither of the agreements were well proved. The Master of the Rolls decreed the 200 *l.* to be applied towards payment

payment of the husbands debts; but, on appeal to the Lord Chancellor, his Lordship was of opinion, that, as the case was, unless there was an agreement that the husband should have the 200*l*, it would survive to the wife, and, therefore, his Lordship directed an issue, as to this point.

And if, on the marriage, there be an agreement made, in consideration of the wife's portion, to make a settlement upon her for a jointure, and to settle lands upon the children of the marriage, and the wife dies before the settlement can be made, yet, her portion shall go to the husband or his representatives, and shall not survive to the representatives of the wife; for he, being in no default, ought not to suffer by the act of God.

Melyth *v.* Wynn. Pre. Ch. 312. Gilb. Eq. Rep. 70. 1 Eq. Ca. Abr. 70, 15.

But, in such case, where a wife survived her husband, who, it was alledged, had, in consideration of her fortune, which he expected to receive (and which was represented to consist of lands and money on bond, and to be of the value of 500 *l*,) settled upon her a jointure of 45 *l. per annum*; the wife alledging *the jointure fell short of what, by the marriage agreement, it ought to have been*, and no fine having been levied, nor assignment made of the bonds, the court dismissed a bill brought by the husband's creditors to subject

Lister *v.* Lister. 2 Vern. 68. Sc. 2 Freem. 102. 1 Eq. Ca. Abr. 68. 3.

conveyed to the husband will survive to the wife.

Cleland *v.* Cleland. Prec. Chan. 63. Sc. 1 Eq. Ca. Abr. 70. 14.

So, where, on the marriage of the plaintiff's father with the defendant, who had a portion of 300 *l.* in her brother's hands secured by his bond, a farm was settled upon the defendant for her jointure, expresly in consideration of 100 *l.* paid for her marriage portion; the husband afterwards dying indebted by bonds, wherein, he and his heirs were bound, and actions being brought thereupon against the plaintiff, as his heir, to subject the real estate descended to the payment thereof, he exhibited his bill to have the remaining 200 *l.* of the portion, which was unpaid, applied in discharge of the debts. It was pretended by the defendant that there was but 100 *l.* of her portion to be paid, and that it was agreed by her husband and herself, before marriage, that the remaining 200 *l.* should be hers; and besides, that her husband being dead, and this being a debt to her, not disposed of, it did by law belong to her. But, for the plaintiff, it was said to have been expresly agreed before the marriage, that the remaining 200 *l.* of her portion should be applied to pay the husbands debts, if there was occasion. Neither of the agreements were well proved. The Master of the Rolls decreed the 200 *l.* to be applied towards payment

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Lister *v.* Lister. 2 Vern. 68. Sc. 2 Freem. 102. 1 Eq. Ca. Abr. 68. 3.

ſubject her property to his debts; ſaying, that the widow had the title in law to the lands, and the ſecurities remaining unaltered, and being choſes in action, the benefit whereof ſurvived to her, equity would not interfere to wreſt them from her.

Packer *v.* Wyndham. Pre. Chan. 412.

If a feme covert be a mortgagee, her huſband, by virtue of the marriage, will be intitled to the mortgage as a choſe in action, though there be no ſettlement; and, if it be reduced into poſſeſſion in his life, it will go to his executors and not ſurvive to his wife. The caſe of *Packer* v. *Wyndham*, as to this point, was attended with circumſtances peculiarly ſtriking. It was thus; Mrs. *Anne Aſhe*, being intitled to the ſum of 5500 *l.* ſecured to her by a mortgage for years taken in the name of truſtees, and likewiſe to 3000 *l.* ſecured in the ſame manner taken in her own name, and to other perſonal property, became a lunatic; and, on a commiſſion of lunacy iſſued out for that purpoſe, the cuſtody of her perſon and eſtate was committed to one of the defendants. Some time after, *Philip Packer*, the plaintiff's brother, by ſome contrivance, got at the lunatic and married her, without making any ſettlement or proviſion for her. *Packer* and others were afterwards committed by the court to the Fleet, and it was ordered, at the ſame time, that all the deeds and

ſecurities

ſecurities relating to the lunatic's fortune, and alſo her jewels &c. ſhould be brought and lodged with one of the Maſters of the court, in order to ſecure ſome proviſion for the wife in caſe ſhe ſhould ſurvive her huſband, and likewiſe for the children of that marriage, in caſe there ſhould be any. Some time afterwards, on Mr. *Packer's* application to the court, by petition, to have the commiſſion of lunacy ſuperſeded, it was ſo directed; but, in regard Mr. *Packer's* eſtate was much incumbered, and he had made no ſettlement on his wife, it was, at the ſame time, ordered, that ſo much of the 5500 *l*, as was neceſſary, ſhould be applied towards diſencumbring his eſtate, and the reſidue laid out in a purchaſe of lands, which, together with ſo much of Mr. *Packer's* eſtate as would make up 500 *l. per annum*, was to be ſettled in ſtrict ſettlement, and the reſt of his lady's fortune was to be paid and delivered to him. Mr. *Packer* never complied with any part of this order; but, being indebted to one *Goodinge* in a conſiderable ſum of money, *Goodinge* brought his action againſt him, recovered judgment and took out a *fi. fa.* and, thereupon, the mortgage of 3000 *l.* was ſold by the ſheriff, and the debt paid. After this, Mr. *Packer*, being indebted to the plaintiffs his ſiſters in about 2000 *l.* each, given them for their portions, did, by indenture taking notice

notice thereof, assign the 5500 *l.* mortgage, and all securities taken for the same, and also all other the fortune and portion belonging to him in right of his wife, to trustees, in trust, in the first place, to pay thereout to the plaintiffs their portions, and then, in trust, for himself, his executors and administrators. Some time afterwards 5500 *l.* was paid in, and Mr. *Packer*, not having complied with the terms of the last order, that sum was again placed out at interest on a security taken in the name of a junior Master of the court; subsequent to which Mr. *Packer* died intestate and without issue, and in about two years Mrs. *Packer* died likewise intestate and without issue. Whereupon the plaintiffs, who were sisters and heirs at law to Mr. *Packer*, and also creditors as above mentioned, took out letters of administration to him; and the defendant took out letters of administration to Mrs. *Packer*, the wife, and brought a cross bill to have the fortune and securities delivered over to him.

Cleland *v.* Cleland. Blois Martin *v.* Lady Hereford. Supra.

And the court resolved that, as to the marriage, it was then out of the case, and that the order of the 19th of *March*, was likewise to be laid aside; for, as the husband, if he had complied with the terms of that order, would have been a purchasor of his wife's fortune, so, he not having complied with

with it, it was juſt as if no ſuch order had been made; that the wife being now dead, and no children left, the reaſon for this court's interpoſing was at an end, and then, as to the 5500*l*, that, being paid in during the coverture, was the huſband's money, and the property abſolutely veſted in him by law. That, although the court had thought fit to lay their hands on it, and had power ſo to do, it having been paid into the Maſter's hands, yet, that was only in the nature of a caution, till the huſband ſhould make ſome proviſion for his wife, which, being then unneceſſary, equity would follow the law and give it to the huſband's repreſentatives, to whom it belonged. As to the three thouſand pounds, that being ſold by the ſheriff on a *fi. fa.* before the huſband's aſſignment, the ſale muſt take place againſt the aſſignment, though perhaps the plaintiff might have an equity to the remainder, after payment of *Goodinge*'s debt; for the huſband might aſſign over a term, on mortgage, for years which he had in right of his wife, and ſo he might likewiſe the truſt of ſuch term, and it would prevail againſt the wife, although ſhe ſurvived.

Boſvil *v.* Brander. 1 Will. 458. Infra. 323.

But the huſband muſt actually reduce a mortgage, to which he is intitled in right of his wife, into poſſeſſion, by procuring payment thereof; or an alienation of it by

him will not be binding upon her after his death, *unleſs it be made for a valuable conſideration*; for, if it be otherwiſe, and he die, ſhe ſurviving, ſuch mortgage will go to her as a choſe in action, and not to his executor.

Burnett Arm. *v.* Kinnaſton. 2 Vern. 401.

Thus, where the plaintiff's teſtator, having married the ſiſter of the defendant, whoſe portion was ſecured to her by a mortgage in fee of part of the defendant's eſtate, after marriage made an aſſignment of his intereſt in the mortgage, and, by articles between him and ſeveral truſtees therein named, the money was to be called in and inveſted in land, to be ſettled to the uſe of the huſband and wife and their iſſue, remainder to the right heirs of the huſband. The huſband and wife being both dead without iſſue, the plaintiff claimed the benefit of the mortgage, by virtue of the articles, as intitled under the huſband. But the court diſmiſſed the bill; becauſe, the mortgage being but in the nature of a choſe in action, the huſband had not an abſolute power over it, but only a right to reduce it into poſſeſſion; which, not having done, his aſſignee ſtood but in the place of the huſband, and could have no greater right or power than the huſband himſelf had, and that was only to reduce it into poſſeſſion in his life-time; and he having neglected ſo to do, it ſurvived

to

to the wife, notwithſtanding the articles, and muſt go to her adminiſtrator.

Although a mortgage, to which the huſband is intitled in right of his wife, will ſurvive to her in caſe of his death as againſt his executors or aſſignees to his uſe; yet, if his creditors get poſſeſſion thereof, and thereby oblige her to apply to a court of equity for aid, the court will not interpoſe it's authority to take the benefit thereof from them.

Thus, where a feme ſole, mortgagee in fee for 800*l*, had married a tradeſman, who became a bankrupt; on a commiſſion of bankruptcy being taken out againſt him, the commiſſioners had aſſigned over all his eſtate real and perſonal, which included this mortgage. Afterwards, the huſband being dead, and the writings relating to the mortgage being in the aſſignees hands, a bill was brought by the widow of the bankrupt againſt the aſſignees for them, and to have the benefit of the mortgage. But, it was held by his honor the Maſter of the Rolls, that, the widow being plaintiff againſt the aſſignees, ſo that ſhe, and not they, ſought aid in equity, and there being in the mortgage-deed a covenant to pay the mortgage money to the wife, this debt or choſe in action was well aſſigned by the Com-

Boſvil *v.* Branden. 1 Will. 458. Supra. 321.

miſſioners to the aſſignees, and veſted in them; and, if the right to the debt was veſted in the aſſignees, as plainly it was, the legal eſtate of the inheritance of the lands, in mortgage, continuing in the wife was not material, it being no more than a truſt for the aſſignees. For, the truſt of the mortgage muſt follow the property of the debt, elſe the mortgagor would be in a very hard caſe; namely, liable to be ſued by the aſſignees of the Commiſſioners upon the covenant, and, alſo, in an ejectment by the wife of the mortgagee; whereas the latter ſuit would be injoined in equity.

1 Will. 459. Bennett *v.* Davies. 2 Will. 316.

But, if there had been any articles before the marriage, purporting, that this mortgage-money ſhould have continued in the wife as her proviſion, or ſhould have been aſſigned in truſt for her, they would have been a ſpecifick lien thereupon, and have preſerved it from the bankruptcy.

Ibid.

In the laſt caſe, the Maſter of the Rolls obſerved, that it might have been a matter of different conſideration, if the aſſignees had been plaintiffs in equity, and deſired the aid thereof to ſtrip the widow of all that ſhe had, towards the doing of which equity would hardly have lent any aſſiſtance; becauſe, the aſſignees, claiming under the bankrupt huſband, could be in no better plight

plight than the huſband would have been: and, if the huſband had, in equity, ſued for the money, or elſe prayed that the mortgagor might be foreclоſed, equity, probably, would not have compelled the mortgagor to pay the money to the huſband, without his making ſome proviſion for his wife. Or, at leaſt, the wife, by an application to the court againſt the huſband and the mortgagor, might have prevented the payment of the money to the huſband, unleſs ſome proviſion had been made for her.

Vide. Jacobſon *v.* Williams. 1 Will. 382.

But, even in that caſe, I ſhould apprehend that, if the huſband was living, the aſſignees of the bankrupt would be allowed the intereſt of the mortgage during his life; becauſe, to that, *he* would have been intitled.

Ibid.

Although, a court of equity, will not uſe it's authority to aid the huſband, or his aſſigneees under a commiſſion of bankruptcy, to obtain the property of the wife, unleſs ſhe be provided for, when it cannot be got at without it's interpoſition, yet, it will not deny it's aſſiſtance to an aſſignee of a particular choſe in action, the property of a feme covert, if he hath paid a valuable conſideration for it.

Thus, where *S.* the defendant's firſt huſband, being poſſeſſed for the reſidue of a

Tudor *v.* Samyne. 2 Vern. 270.

term of thirty-one years, granted by *L.* in the year 1676, conveyed it to truſtees for the ſeparate uſe and benefit of the defendant his wife. She married *S.* a ſecond huſband; *S.* firſt mortgaged this term to *V.* who, then, with him, aſſigned it to the plaintiff *T*; and then *T.* brought a bill againſt the wife and her truſtees to compel them to convey the legal eſtate to the plaintiff: and it was ſo decreed; for, as a huſband may diſpoſe of a term for years, where the legal eſtate is in his wife, ſo, he may of the truſt of a term, without either the wife, or the truſtees, joining.

It was objected, in this caſe, that the huſband had made no ſettlement, or proviſion for his wife; and, as, if he was plaintiff, the court would not decree the truſtees to aſſign to him, without making ſome ſettlement on her, his aſſignee ought not to be in any better condition: but this argument was rejected by the court.

It is neceſſary here to obſerve the diſtinction taken by the Maſter of the Rolls, as to the chattels real or choſes in action of a feme covert, between the caſe of the aſſignees of a bankrupt, obliged to have recourſe to equity to obtain the wife's fortune, and the laſt caſe of a ſpecific aſſignee. For, the better opinion ſeems to be, that, in the former

mer caſe, the courts of equity would not interpoſe, in favour of the aſſignees, to take that part of the wife's property, which the bankrupt himſelf could not get at, without their interference, unleſs ſhe were provided for; but, that they would give their aſſiſtance, in the latter caſe, to a ſpecific aſſignee, although they would not aid the huſband himſelf, or his aſſignees under a commiſſion. As, although theſe deciſions ſeem at firſt contradictory, the claim in both caſes being founded on the intereſt of the huſband in his wife's fortune, yet, they appear to me, on reflection, perfectly reconcileable to each other, and equally founded upon principles of the pureſt equity. The grand and only object of the bankrupt laws, is, to do juſtice to the creditors at large, by procuring an equal diviſion of all the bankrupt's property, from which he may be thought to have derived credit, and, to which the creditors have looked as to their ultimate ſecurity: and, to that end, they veſt that property in the aſſignees, who, from the time of the act of bankruptcy committed, ſtand, by virtue of theſe ſtatutes, in the preciſe ſituation the bankrupt would have been, if no commiſſion had iſſued. This being their object, there is no reaſon why equity ſhould extend them farther than, what is neceſſary, to obtain that end. As the bankrupt, therefore, can gain no credit from

Vide. Supra. 325.

the principal of his wife's fortune, when it is in the hands of an officer of the court, or of a third perſon, who cannot be compelled to deliver it up, but through the medium of a court of equity, becauſe, in that caſe, it can never become part of his ſtock, there is no equity to induce the court to give an aſſiſtance to the aſſignees, againſt the wife, which it would refuſe to the bankrupt himſelf. From the intereſt of her fortune he may be ſaid to have derived credit, as that paſſes through his hands and enables him to maintain a better appearance; that, therefore, the aſſignees will be aſſiſted to procure, but, to the principal, this reaſoning will not apply; as to that, the claim of the aſſignees and of the wife, ſtand, in equity, upon an equal footing. The former, applies for the aid of the court to enable them to procure all the bankrupt's effects to pay his debts; the latter, prays the court not to interfere, as the conſequence, if they do, will be her being left deſtitute, in the event of ſurviving her huſband, although there is property on which ſhe has a claim.—Both applicants are innocent perſons, having ſuffered, or liable to ſuffer, an injury, conſequently, equally favoured in equity; in ſuch caſe, therefore, equity will ſtand indifferent, and will lend aid to neither of them, but will leave the law to take it's courſe. But, the caſe is different where the

huſband aliens or charges his wife's chattel real or choſe in action for a valuable conſideration; for there, the alienee looks to the ſpecific thing in his contract, and gives credit to the property, and not to the perſon, and the court conſider him as having a *lien* thereon, which equity will inforce; it being a rule *in equity always to ſupport a purchaſor, whoſe title to the property purchaſed, is founded upon a civil as well as moral obligation,* againſt a volunteer, or one whoſe claim is founded upon a *moral relation* only; in which light, it ſeems to me, the wife may be viewed. Beſides, the wife, by marriage, hath in ſome degree, truſted the huſband with the diſpoſition of her property, which the alienee hath not; and where, between two perſons, one who hath placed a confidence and the other who hath not, a loſs muſt be ſuſtained, equity will aid the latter againſt the former; for it is a maxim, that *he who truſts moſt, muſt ſuffer moſt.*

Thus, a promiſe by a huſband, to aſſign his wife's mortgage, as a ſecurity for a debt, accompanied with a lodgment of the deeds, although no aſſignment thereof be actually made, will be ſuch a diſpoſition of it, in equity, as will be good againſt the wife, *pro tanto.*

As, where *D*'s wife was one, of three ſiſters intitled to their brother's perſonal eſtate; Bates *v.* Dandy. 2 Atk. 207.

eſtate; the brother died inteſtate, and adminiſtration was granted to two other perſons, with the three ſiſters and their huſbands; one of the adminiſtrators came to an agreement to divide the perſonal eſtate into thirds, a third to be allotted to each; a memorandum, under the account, was ſigned by all; two mortgages, one in fee and the other for a term, each for 150 *l*, were allotted to *D*'s wife; the legal intereſt was not aſſigned; but, by the memorandum, was agreed ſo to be. Before any aſſignment, *D*. borrowed 200 *l*, of the plaintiff on note, and, by agreement under note, took notice that he had, the better to ſecure the 200*l*, left two mortgages with him, which he was intitled to, and promiſed forthwith to aſſign. Before any thing done, *D*, died; the plaintiff's bill was brought againſt the wife of *D*, *D*'s adminiſtrator, and the mortgagors, to be paid his 200 *l*, and intereſt, or to foreclоſe the mortgagees. It was argued, on behalf of the wife, that the mortgages were her choſes in action, and, not having been aſſigned by her huſband, ſurvived to her; or, at leaſt, that ſhe was intitled to them on paying the plaintiff's debt. The adminiſtrator of the huſband inſiſted, that, in equity, what *D*. had done amounted to an aſſignment, and that he was intitled to redeem the plaintiff. But, it was adjudged, that the agreement amongſt the three ſiſters, and

and the ſeparating the mortgages from other parts of the eſtate, was an appropriation of them to *D.* and his wife; and, that *D*'s heir, and adminiſtrator, were truſtees for *D.* and his wife in the two mortgages. That *D*, being intitled in right of his wife to the truſt of theſe mortgages, had a power to aſſign them for his own uſe; that, leaving them with the plaintiff, and giving his note, promiſing he would procure them to be aſſigned, amounted, in equity, to a diſpoſition of them for ſo much, as to ſatisfy the debt to the plaintiff, but not for more. For, though *he might* have diſpoſed of the whole in the manner he did, *his intention* was, only, to ſecure the plaintiff's debt, which, being done, the mortgages belonged to the widow as her choſes in action, and not to the huſband's adminiſtrator; that, although one of the mortgages was in fee, it made no difference; for, a huſband might diſpoſe of the wife's mortgage in fee, as well as her mortgage for a term.

Watts v. Thomas. 2 Will. 364.

Where a tradeſman, having, after marriage, purchaſed a term for years to himſelf and his wife, and the ſurvivor, and the executors, adminiſtrators, and aſſigns of ſuch ſurvivor for the reſidue of the term, mortgaged it without the wife's joining, with a proviſo, that, if the huſband or wife, or either of them, or their or either of their executors or adminiſtrators,

ſhould pay the mortgage money and intereſt at the day, then the mortgage ſhould be void; and that, until default of payment, the huſband, his executors, and adminiſtrators, ſhould quietly enjoy. Seven years after he died, in debt, leaving his wife executrix, and the mortgage money unpaid. The queſtion was, whether, the equity of redemption of this term was aſſets for the payment of the huſband's debts, or, it ſhould go to the wife, as ſurvivor? And it was held, by the Maſter of the Rolls, that the ſettlement on the wife, being made after marriage, was a voluntary conveyance; that, being only a term for years, and, conſequently, always in the power of the huſband to forfeit or alien, the mortgage was an alienation. For, though if the mortgage money had been paid before the day, the mortgage would have been void, and conſequently all things would have been in *ſtatu quo*; yet, the mortgage being forfeited, the equity of redemption was now become a creature of equity; and, it being in the caſe of creditors, and the redemption given, as well to the executors of the huſband as to the executors of the wife, and the laſt proviſo being, that the huſband, his executors, *&c.* might enjoy till default of payment, he decreed, that the equity of redemption of this term ſhould be aſſets.

CAP.

CAP. XII.

Out of what Funds Mortgages are to be redeemed.

WHen a perſon dies, leaving a variety of funds, one of which muſt be ſaddled with a debt, and the owner does nothing from whence an inference can be drawn, which fund he meant ſhould be applied to diſcharge it, it is a rule, in equity, that the fund, *which received the benefit by contracting the debt*, ſhould make ſatisfaction. The conſequence of which maxim is, that, if money be borrowed upon mortgage, and the mortgagor die, leaving a real and perſonal eſtate, and charge neither of them, ſpecifically, with payment thereof, the latter ſhall be burthened therewith: For, the debt being perſonal, the perſonal aſſets ought to be firſt applied to diſcharge it. If an executor, therefore, hath aſſets, he is compellable to redeem mortgages for the benefit of the heir.

Cope *v.* Cope. 2 Salk. 449. S. C. Eq. Ca. Abr. 269. 1 Ch. Ca. 74. 271. 2 Ch. Ca. 5. Ca. temp. Talbot. 54. Earl of Belvidere *v.* Rochfort. 6 Brown's Parl. Ca. 520. 14. Hard. 512.

Lord Howard *et al. v.* Sir John Napier. 3 Brown's Parl.

Although a ſpecialty creditor, may ſue either the heir or executor, and, in either caſe, will be intitled to the benefit of his ſecurity,

ſecurity, yet, if the heir be charged in debt, when the executor hath aſſets, the heir may compel the executor, in equity, to pay the debt.

Howel *v.* Price. Pre. Ch. 477. Gray *v.* Gray Chicheſter *v.* Philips. Hale *v.* Hale Caſes cited therein. Bartholomew *v.* May. 1 Atk. Rep. 487.

An *hæres factus*, as well as an *hæres natus*, will now be allowed the benefit of having the real eſtate diſincumbered for him. Thus, where *M.* deviſed his lands at *H*, then in mortgage for 1300 *l*, to *R.* in tail, remainder over, and other lands to *T.* ſubject to the payment of his debts, in caſe his perſonal eſtate, and other eſtates, deviſed for that purpoſe, ſhould not prove ſufficient to ſatisfy all of them. The court was of opinion, that the perſonal eſtate muſt be firſt applied to pay the 1300 *l*, as a debt of the teſtator, and that the real eſtate, deviſed for payment thereof, ſhould not be liable, unleſs the perſonal was not ſufficient.

And ſuch debt, on mortgage, will leſſen the widow's cuſtomary moiety in the province of *York*.

Pockley *v.* Pockley. 1 Vern. 36. S. C. By name of Popley. *v.* Popley. 2 Ch. Ca. 84.

Therefore, where *S*, having lent *R.* 1600 *l.* with an intent to lend 1400 *l.* more, took a mortgage for the money in *P*'s name, and then died; his executors refuſing to lend the other 1400 *l*, *P.* advanced 1500 *l*, of his own money, in the purchaſe of an annuity in fee out of the lands contained

in

in the mortgage, and took an aſſignment of the mortgage to protect his purchaſe, declaring, the uſes thereof to be for the benefit of him and his heirs: *P.* then made his will, appointing all his debts to be paid, but particularly mentioning the debt of 1600 *l.* to *S*'s eſtate, and, thereby, deviſed his real eſtate to his nephew. *P.* dying without child within the province of *York*, where, by the cuſtom, his widow was intitled to a moiety of his perſonal eſtate, the queſtion, between the widow, and the nephew who was deviſee of the real eſtate, was, whether this debt ſhould be paid out of the real or perſonal aſſets? And it was reſolved, that the perſonal eſtate ſhould be liable.

And, although the ſecurity be in the nature of a *Welſh* mortgage, and there be no certain time for redemption, yet, the rule is the ſame, as to the application of the aſſets. Howel *v.* Price. Pre. Ch. 477.

If a man make a ſettlement of his eſtates upon truſtees for performance of his will, and payment of debts and legacies, and, at the ſame time, make his will and thereby deviſe that the truſtees ſhall pay ſeveral legacies, and that the ſurplus ſhall go to the heir, *and make his wife executrix*, but does not *expreſsly* deviſe the perſonal eſtate to her. The ſame rule applies as to the diſtri-

distribution of the assets; for, if there had been no executor named, the administrator must have applied the personal estate in ease of the real, and an *executor* takes no more to his *own* use than an *administrator*. Thus, where *R*, having three sons *R*. *C*. and *F*. and one daughter *K*. made a conveyance of the manor of *G*, to trustees and their heirs to pay his debts and legacies, and, subject thereto, for performance of his will; and, at the same time, made his will, and, thereby, directed the trustees to pay 2000 *l*. a piece to *R*. and *C*, 6000 *l*, to *K*. his daughter, *and the surplus to F. his heir*; and also devised, that his three younger children *R*. *C*. and *K*, legatees, should release to his executrix all such actions and demands, on his personal estate, as they should have, and made his wife executrix, but gave her not, thereby, in terms, his personal estate. The question was, whether the executrix should be liable to the legacies of *R*. *C*. and *K*. in aid of *F*, the heir, who was to have the surplus of what should rise from the sale of *G*? It was agreed she must be liable as to the creditors; but, as to the younger children's legacies, it was insisted that there ought to be no aid in favour of *F*, the heir, for, when the legatees, were, by the will, to release all demands, out of the personal estate, they could make no demand thereupon; that this clause shewed the intent

Lord Grey *v.* Lady Grey. 1 Ch. Ca. 297.

of

of the teſtator, that the perſonal eſtate ſhould be diſcharged; that, therefore, the executrix ought to enjoy it free againſt thoſe legacies of which the teſtator diſcharged her, eſpecially, when he had otherwiſe provided for their ſatisfaction; and the ſurplus to *F*, the heir, was, expreſsly, after debts and legacies paid. But, it was argued on the other ſide, and reſolved by the court, that, regularly, the perſonal eſtate muſt go in aid of the heir; for an implied intent could not be permitted to alter the equitable general law. And the Lord Chancellor decreed, the perſonal eſtate to be accounted for in aid of the heir for what he ſhould be charged withal, not only as to the creditors, but, as to the legacies charged on *Goſfield*; namely, 2000 & 6000 *l.* to the younger children.

Although lands be deviſed for payment of debts and legacies, and the reſidue of the perſonal eſtate, after the debts and legacies paid, be given to the executrix *generally*, the perſonal eſtate muſt, notwithſtanding, be applied, as far as it will go, to the payment of the debts, and the land charged no farther than is neceſſary to make up the deficiency: for, in this caſe, the intereſt of the executor, in the perſonal aſſets, is the ſame, whether he takes them by expreſs deviſe, or as the reſidue.

Anonymous. 2 Vent. 349. Noke Exr. of Medlicot *v.* Darby *et al.* 3 Brown's Ca. Parl. 290.

Meynell *v.* Howard. Pre. Ch. 61. Ibid. 477.

So, if a man make a mortgage, and, afterwards, by his will, *deviſe his perſonal eſtate* among his relations, the perſonal eſtate muſt, nevertheleſs, be applied towards the diſcharge of the mortgage.

But, however, here we are to obſerve, that although the perſonal eſtate be the proper fund out of which mortgages are to be paid off, yet, if the teſtator, directly, exempts it, it will be diſcharged thereby.

Lemon *v.* Newnham. 1 Vez. 51.

Thus, where Sir *William Lemon*, poſſeſſed of a real and perſonal eſtate, the former incumbered by ſeveral mortgages of his anceſtors, made his will, in which was inſerted this particular clauſe. "I deſire all "my debts may be diſcharged by my exe- "cutors, I mean thoſe *only of my own con-* "*tracting, not thoſe heavier debts charged* "*by my family:*" and, after giving ſeveral legacies, gave his perſonal eſtate to his mother, whom he made executrix, deſiring her to pay all his juſt debts *exactly*; the mother, after the making the will, bought in the mortgages, which were aſſigned to her, and, for the payment of which, the ſon entered into a covenant. He died in 1741, there having been no payment, or demand of, principal or intereſt for twenty years. In 1744, the mother brought a bill againſt the preſent plaintiff and defendant *L.* and

N, who were the co-heirs at law of her ſon, for payment of the mortgages, or elſe to foreclose. Afterwards, ſhe, dying, made *L*, one of the co-heirs, her executor, who got his name ſtruck out of the original, and, now, brought a bill of revivor againſt the other co-heir for a ſale of the mortgaged premiſes, and that, out of the money ariſing thereby, the principal and intereſt due ſhould be paid by *N.* the defendant, the plaintiff claiming by a double right, as executor of the mother, who ſtood in the place of the mortgagee, and as co-heir of her ſon. One queſtion was, out of what fund theſe mortgages were to be paid? And it was held by Sir *William Forteſcue*, Maſter of the Rolls, that the will, by which it was agreed, that he had a power to charge his real or perſonal eſtate with theſe mortgages, was the proper rule to go by, as far as it directed; ſo that the queſtion was, whether, and how far, he had done ſo? It had been inſiſted, that the perſonal eſtate, being the proper fund, it could not be diſcharged without particular words; and that, therefore, though there was a direction for payment of the debts out of the real eſtate, that would not change the fund, but would only make good any deficiency of the perſonal eſtate. That was the general rule, but *here* there were expreſs words of exemption. It had been ſaid, that, though there was this exemption in the firſt clauſe, it was not in the

latter, where the teſtator directed all his juſt debts to be paid *exactly*. In anſwer to which the court ſaid, it was a conſtant rule, that one part of a will was not to be conſtrued contradictory to another, if both would ſtand; and, when the teſtator had ſo particularly explained what he meant by his debts, it would be hard to give it a different conſtruction.

Feltham's Caſe. 1 Lev. 203.

So, a diſtinction is to be taken, where an eſtate is deviſed to be ſold for payment of debts, and where the debts are charged upon it, and the eſtate made liable to them; for, in the former caſe, the perſonal eſtate will not be applied in eaſe of the real.

Wainwright *v.* Benlowes. 2 Vern. 718. Sc. 1. Eq. Abr. 271. p. 12. Sc. Gilb. Eq. Rep. 125. Sc. Pre. Ch. 451.

And the caſe is ſtill ſtronger, if the ſurplus ariſing from the ſale, is not, after the debts paid, to go to the heir, but is deviſed away. As where *B.* deviſed his fee-farm rent to be ſold for the payment of his debts, and gave the ſurplus ariſing from the ſale, after debts paid, to his brothers, and willed his houſehold goods ſhould go along with his houſe, and deviſed the reſt and reſidue of his perſonal eſtate to his ſiſter and made her executrix: for, the overplus, in ſuch caſe, is deviſed, as a pecuniary legacy, and, not as a real eſtate; and, then, the *quantum* of ſuch pecuniary legacy is to be aſcertained according to the intention of the teſtator, which can only be done, by taking the debts and lega-

cies out of the price and value of the lands: and, therefore, it would alter the intention of the teſtator, to caſt in, the perſonal eſtate, by way of exoneration.

So, although, as between the heir and executor or *reſiduary* legatee, the perſonal will be liable to diſencumber the real eſtate, for the reaſons already aſſigned. Yet, this rule ceaſes, where it would operate to prejudice ſimple contract-creditors, or general legatees. For, in ſuch caſes, if the creditors, whoſe demands attach both upon the real and perſonal eſtate, elect to take their ſecurity on the latter to eaſe the heir, or, as the fund readieſt of acceſs, yet, he will not be benefited thereby to the diſadvantage of the ſimple contract-creditors or legatees; but, they will be intitled to ſtand in the room of the ſpecialty creditors, and to come upon the *real eſtate* in as large an extent, as the *perſonal eſtate* is diminiſhed by the demands of the latter.

Lutkins v. Leigh. Ca. temp. Talbot 53. Infra. 342.

Thus, where the father, ſeiſed in fee, having mortgaged land and given a ſtatute to the mortgagee to pay, &c. made his will deviſing 500 *l.* to his daughter, and then died; and the mortgagee took ſo much of the perſonal eſtate in execution on the ſtatute, that, thereby, there were not ſufficient aſſets left to pay the legacy. The queſtion was, whether

Anonymous. 2 Ch. Ca. 4, 5.

ther the daughter ſhould have relief againſt the heir, who had been exonerated out of the perſonal eſtate, which was liable to the legacy? And it was decreed, that ſhe ſhould; for, where there are not aſſets to pay the ſimple contract-creditors, and the general legatees, the real eſtate ſhall be applied in payment of the ſpecialty debts.

Lutkins v. Leigh. Ca. temp. Talbot 53. Supra, 341.

And the law, now, is held to be the ſame in favour of a general legatee againſt the deviſee of a mortgaged eſtate. So where *K*, having mortgaged his freehold lands to *A.* for ſecuring 2500 *l*, made his will commencing with theſe words: "As touching "my wordly eſtate, after payment of my "debts and funeral charges, which I will "to be firſt paid, I give my freehold "eſtate in *Kent* to my wife for life, charge-"able with an annuity of 30 *l.* for life for "*E*;" and, after his wife's death, deviſed his ſaid freehold eſtate, ſo charged, to the three children of his ſiſters; and directed the reſt of his perſonal eſtate to be placed out at intereſt, the intereſt to be paid to his wife during her life, and, after her death, to be divided among the children; and alſo gave his wife 1500 *l*, with a proviſoe, that the deviſes and bequeſts in the will ſhould be accepted by the wife inſtead of dower, and in full ſatisfaction of her ſhare of the perſonal eſtate. The queſtion was, whether the

the perſonal eſtate ſhould be applied in exoneration of the real, ſo as to defeat the pecuniary legacies, there not being, in that caſe, ſufficient to pay the 1500 *l*: and the court reſolved, that it ſhould not; for, the real eſtate, in this caſe, being deviſed away, gave the legatees rather a ſtronger claim than where they had to do with an heir at law; ſince it was a long time before a deviſee could prevail with the court, to have the perſonal eſtate applied in exoneration of the real, as appeared from many ancient reports which diſtinguiſhed, in that caſe, between a deviſee and an heir at law; though, at laſt, the latter had prevailed where there was no damage done to a third perſon.

But, if the teſtator deviſe his real eſtate ſpecifically to one, and then die leaving debts and legacies, and the creditors, who might come upon the real eſtate, come upon the perſonal; if that be exhauſted, the general legatees cannot have recourſe to the real aſſets, for ſo much as the perſonal aſſets fall ſhort by payment of the debts; becauſe, *a general legatee ſhall never take from a ſpecific one.*

And therefore, in the caſe of *Clifton* v. *Burt*, where *A*, (ſeiſed in fee of freehold lands, and likewiſe of ſome copyhold lands

Clifton *v.* Burt. 1 Will. 678.

which he had not ſurrendered to the uſe of his will, and indebted by bond in which his heirs were bound,) made his will in 1708, whereby he deviſed his *freehold lands to* B. *in fee*, without charging them with any of his debts and legacies, and gave his copyhold lands to *C.* in fee, in truſt to ſell to pay his debts and legacies; and, having given a legacy of 500 *l.* to *D.* died, leaving *E.* his executor. *D*, the legatee of the 500 *l*, brought his bill for his legacy: upon which, Lord *Harcourt* decreed, that, as to ſo much of the perſonal eſtate as was exhauſted by the bond debt, the legatee of the 500 *l.* ſhould ſtand in the place of the bond creditor againſt the land, and that the freehold eſtate ſhould be liable, in default of perſonal aſſets, to pay the legacy.

From this decree, the deviſee of the freehold lands appealed to Lord *Parker*, inſiſting, that, the 500 *l.* legacy being by the will charged on the copyhold eſtate, and that fund failing for want of a ſurrender, the freehold eſtate, which was expreſsly deviſed to another perſon, ought not to be liable; and that the land, being *ſpecifically* deviſed, was not chargeable with a general pecuniary legacy.

And Lord *Parker*, having taken time to conſider of it, reverſed that part of the decree,

ree, whereby, the freehold eſtate was ſubjected to the legacy; obſerving, firſt, that, although equity would marſhal aſſets in favour of a legatee as well as of a ſimple contract creditor, yet, every deviſee of land was a ſpecific legatee, and, being ſo, ſhould not be broken in upon, or made to contribute towards a pecuniary legacy. Secondly, that it was a rule, that, if one gave a ſpecific legacy of a horſe, or of a diamond, to *A*, and alſo a pecuniary legacy of 500 *l*, to *B*. and there were not aſſets to pay both, ſtill, the ſpecific legatee ſhould be preferred and have his whole legacy; for, were the executor to make him contribute towards the pecuniary legacy, this would be, *pro tanto*, to make ſuch ſpecific legatee buy his legacy, againſt the manifeſt intention of the teſtator. Thirdly, that if a ſpecific perſonal legatee ſhould not contribute towards a pecuniary legacy, much leſs ſhould a ſpecific deviſee of lands. Fourthly, that if, in the principal caſe, the teſtator had deviſed the 500 *l*. to *A*, and a term of 500 years to *B*, without leaving aſſets to pay the 500 *l*, ſtill, the ſpecific legatee of the leaſe ought to prevail, without contributing towards the pecuniary legacy; and, if ſuch pecuniary legatee ſhould not break in upon a ſpecific legatee of a term; a *fortiori*, he ſhould not diſappoint the will, as to a deviſe in fee, which was more to be favoured than a deviſe of a term, becauſe

it

it was with more difficulty that a court of equity, in any caſe, broke in upon, or charged, a real eſtate. Fifthly, that this caſe, where the teſtator had appointed a fund for the payment of the legacies, (*viz.*) the copyhold, was ſtill ſtronger, and, although that had failed for want of a ſurrender, the conſequence would be, that, the fund failing, the legacy muſt fail alſo. Indeed, the bond-creditor might elect to have his debt out of the aſſets in the hands of the heir, or of the deviſee, but, in ſuch caſe, in general, the heir or the deviſee ſhould have this relief; (*viz.*) to ſtand in the place of the bond-creditor, and reimburſe himſelf out of the perſonal eſtate. Sixthly, but, though equity would *thus* marſhal the application of aſſets, yet, it would not do this and thereby diſappoint the will of the teſtator by breaking in upon the deviſe of the freehold, which the teſtator did not intend to charge, but, on the contrary, ſhewed his deſign to charge the copyhold-eſtate therewith.

A deviſe of *all a man's real eſtates* is conſidered as a ſpecific deviſe; and, if both the real and perſonal eſtate be ſpecifically deviſed, they ſhall contribute, equally, in diſcharging debts by ſpecialty and incumbrances.

Long *v.* Short. 1 Will. 403.

Thus, where one, ſeiſed in fee of ſome lands, and poſſeſſed of a leaſe for years in other

other lands, being indebted by ſpecialty and ſimple contract, made his will, and, thereby, deviſed a rent-charge of 40 *l.* a year, out of the leaſe for years, to one grandſon, bequeathed the leaſe itſelf to another grandſon, and gave all his lands, in fee, to *A.* and his heirs; none of his deviſees were his heirs at law, and the will was made after the ſtatute of fraudulent deviſes; there being a deficiency of aſſets to pay debts, the queſtion was, whether they ſhould be charged on the real or leaſehold eſtate? And it was decreed, firſt, that a deviſe of a rent-charge, out of a term, was, *as much*, a ſpecific legacy, as if it had been of the term itſelf. Secondly, that the deviſe of a term for years, was, *as much*, a ſpecific deviſe, as a deviſe of lands in fee: wherefore, each being *equally* ſpecific deviſes, it would, in this caſe, be an equal diſappointment of the teſtator's intent, to defeat either by ſubjecting it to the teſtator's debts. Thirdly, that, ſince the ſtatute of fraudulent deviſes, lands in fee were *equally* ſubject to debts, by ſpecialty, in the hands of the deviſee, as leaſes, in the hands of the executor or legatee, were, at common law, to debts by ſimple contract. So that, to prevent the diſappointment of the teſtator's intent, the court thought it reaſonable, that the deviſee of the fee ſimple eſtate, and the deviſees of the leaſe and annuity, ſhould, *each*, contribute

to

to the debts by ſpecialty, in proportion to the value of their reſpective premiſes; but that, as to the debts by ſimple contract, if there ſhould not be enough, over and above, to pay them, they muſt fall upon the leaſehold premiſes, only.

We muſt here remark the diſtinction between the laſt caſe, which was a deviſe *of all the teſtator's lands* in fee to *A*, and the caſe, of a deviſe to *A.* of *all the reſt of a teſtator's lands*; for, the latter would have been a *reſiduary*, not a *ſpecific* deviſe. The reaſon appears to me to be, that, the latter deviſe doth not convey to the deviſee a certain fixed property, capable of being aſcertained, immediately, upon the will being conſummate, that is, upon the death of the teſtator, as the former deviſe does; but, the *quantum* of the deviſe remains uncertain until a liquidation by the heir and executor; and therefore, the perſon, taking thereby, cannot come in until the debts by ſpecialty, or otherwiſe, have been paid out of the teſtator's eſtates.

Where the deſcent is broke, and the heir at law made to take *by purchaſe*, he will be conſidered as a ſpecific deviſee.

Herne *v.* Merick. Salk. 416.

Thus, where one, ſeiſed in fee, indebted in bonds, gave legacies to children whom he

he had *otherwiſe provided for* before, and deviſed his lands to his *eldeſt ſon in tail*; the eldeſt ſon, being alſo executor, paid the bonds with the perſonal eſtate; the legatees brought a bill to be let into the real eſtate in the place of the bond-creditors, and be paid out of the land. But although the court admitted, that, if the lands had deſcended, the legatees might have been relieved in this manner, yet, ſince the teſtator had deviſed them, it was reſolved, they ought to be exempted; for, it was as much the teſtator's intention, that the deviſee ſhould have this land, as that, the others ſhould have the legacies.

If the chattels real of the mortgagor be ſpecifically deviſed, the heir ſhall not come thereupon, to be exonerated from a mortgage upon the real eſtate.

Thus, where *A*, ſeiſed in fee of a real eſtate, which he had mortgaged for 500 *l*, and poſſeſſed of a *leaſehold*, deviſed the former to his eldeſt ſon in fee, and *gave* the latter to his wife, and then died, leaving debts, which would exhauſt all his perſonal effects except the leaſehold given to his wife. The queſtion was, whether, there being (as uſual,) a covenant to pay the mortgage money, the leaſehold premiſes, deviſed to the wife, ſhould be liable to diſcharge the

Oneal *v.* Mead. 1 Will. 693.

the mortgage. And the Maſter of the Rolls, after taking time to conſider of it, and being attended with precedents, decreed, that, as the teſtator had charged his real eſtate by this mortgage, and, on the other hand, *ſpecifically* bequeathed the leaſehold to his wife, the heir ſhould not diſappoint *her legacy* by laying the mortgage debt upon it, as he might have done, had it not been *ſpecifically* deviſed: and, that, though the mortgage premiſes were alſo *ſpecifically* given to the heir, yet, in this caſe, he to whom they were thus deviſed, muſt take them *cum onere*, as probably they were intended to paſs.

Sir Peter Soame's caſe cited in the principal caſe.

Even *money* may be *ſpecifically* deviſed; but, then, it muſt be under ſuch circumſtances of locality, and in ſuch a ſituation, that the legatee may identify it, and ſay that *he hath a right to that very money in ſpecie:* for, it is of the eſſence of a ſpecific legacy, that, by the aſſent of the executors, the *property* in the *identical thing*, will immediately *veſt*, and not remain *fluctuating* until the arrangement of the teſtator's affairs; for, if *that* be neceſſary, it is no *ſpecific* legacy.

Smallbone *v.* Brace. Swinb. 28. ſaid to be in Chanc. Ca. 303.

Thus, where the teſtatrix deviſed 400 *l.* to the plaintiff *S.* to be paid to him *out of* 500 *l*, *ſecured by a ſtatute* &c. by *C*, and made the defendant *B.* her executor. On a bill

bill brought by *S*, againſt *B*, for payment of the money, the queſtion was, whether this was a ſpecific legacy? And it was held ſo to be; and decreed, to be paid to the plaintiff.

Sed quær. where, for not there.

So, where *I S*, having *money* ſecured to him by *bond*, in the names of *A.* and *B.* in truſt for himſelf, deviſed it; the court held, that the deviſe of this ſum of money was a *ſpecific* legacy.

Lord Caſtleton *v.* Lord Fanſhaw. 1 Eq. Ca. Abr. 298. 2.

So, where the teſtator, having deviſed 3400 *l*, to be laid out, by his executors, in the purchaſe of annuities in the exchequer for ninety-nine years term, to be enjoyed by his wife for her life, ſhe releaſing her dower, and, after her deceaſe, to go equally to his two daughters, bequeathed a thouſand pounds a-piece to the latter, and died leaving little more aſſets than would pay the 3400 *l*; the court held, that the legacy of 3400 *l.* was ſpecific, for, it muſt be taken as a deviſe of *an annuity*, and, therefore, was a *ſpecific* legacy.

Burridge *v.* Bradyl. 1 Will. 127. S. C. Swinb. 28.

But, here we muſt remark, that the deviſe, of the perſonal-eſtate, muſt be clear, certain, and exactly defined, not looſe and equivocal; or, it will not operate ſo as to alter the ordinary courſe of applying aſſets; an infraction upon which, the courts view with a jealous eye, and never permit, but where the intention of the teſtator, (who hath an abſolute

ſolute power over his property,) to appropriate them otherwiſe, is *clearly* expreſſed, or, *neceſſarily* implied.

Hinton *v.* Pinke. 1 Will. 539. Sc. Swinb. 29.

Therefore, where the teſtatrix, by her will, bequeathed ſeveral pecuniary legacies, and, *inter alia*, gave 1500 *l*, to her eldeſt ſon, in truſt to lay it out in a purchaſe of lands in fee, and to grant a rent charge of 50 *l per annum* thereout to *his* daughter, the plaintiff *M.* the wife of *H*, for her ſeparate uſe, but, that if her eldeſt ſon ſhould refuſe or neglect to lay out 1500 *l.* in a purchaſe and to grant this rent-charge, then, he ſhould have but 500 *l.* of the money, and the remaining 1000 *l.* ſhould be laid out, as far as it would go, in the purchaſe of an annuity, for the ſeparate uſe of the daughter; the queſtion was, whether the 1500 *l.* was a *ſpecific* legacy? And, on the part of the plaintiff, it was inſiſted, that it was; becauſe, it was ordered to be laid out in *land*, and, conſequently, was to be taken as a deviſe of land, by which means it was become a ſpecific deviſe. But Lord *Parker* held otherwiſe; for, admitting the 1500 *l.* legacy ſhould be taken as land, the queſtion would be, what the legacy was, or how much ſhould be laid out in land? The legatee of the 1500 *l.* could not ſay ſhe had a right to it *in ſpecie*; was it poſſible, ſuppoſing, there had been, in the preſent caſe, 1500 *l*, of the teſtator's money

money, laid upon the table, that the plaintiff, the legatee, could ſay, ſhe had a right to this money, in *ſpecie*? If not, then, it was no ſpecific legacy. But, his Lordſhip obſerved *that*, the will ſaying, that, in caſe of the ſon's refuſing or neglecting to make this purchaſe, then, he was to have but 500 *l*, of the 1500 *l*. legacy, and the daughter the remaining 1000 *l*, therefore his Lordſhip took the daughter to be a general legatee for 1000 *l*.

Lord *Parker*, in the laſt caſe, ſaid, that, though he could not come into the reſolution of Lord *Cowper* in the caſe of *Burridge* v. *Bradyl*, yet, if it were inſiſted upon, he had ſuch a regard for the precedent, as cited, that he would ſee the decretal order; but this was not urged. Supra. 351.

However, there is obviouſly a clear and evident diſtinction between theſe caſes; for, in the laſt caſe, the teſtator hath not fixed upon any certain diſtinct money, which, from it's *locality*, might be ſpecifically aſcertained to belong to the legatee, and *the ſum*, directed to be laid out, *is fluctuating*, and, is rather deſcriptive of the *quantity* of the legacy, than, of the *thing itſelf*; in which caſe, even a *deviſe of lands* would not be *ſpecific*, as was held, in *Wilkinſon*'s caſe. There, *P*, ſeiſed of lands and houſes in fee, by his will, deviſed lands, in fee, of one hundred *per annum*, to *A*. to be ſet out by his executor, and alſo

—— v. Wilkinſon. 2 Ch. Ca. 25.

5000 *l.* to one kinſman, and 3000 *l.* to another, and then died. The executor ſet out to *A.* lands as of the value of 100 *l. per annum*, that were worth more, and, thereby, the lands and houſes left, were not ſufficient to pay the other legatees. On this they exhibited a bill, to avoid the ſetting out of the lands, the defence to which, was, that the deviſe of the lands was a ſpecific legacy; but, the Lord Chancellor decreed, that it was not a *ſpecific* legacy, but, *quantitatis*. But, in the caſe of *Burridge* v. *Bradyl*, the deviſe was clear and deciſive, as to the ſum to be laid out, which was not to fluctuate upon any ſubſequent event; and, being to be inveſted in the purchaſe of an annuity, immediately, on the death of the teſtator, might be conſidered, by the court, (who take *that* as *done*, which *ought to be done*,) as an annuity *actually* deviſed. Beſides, it would, in this caſe, have been irreconcileable with the intent of the teſtator, to have given the daughters part of the 4500 *l*, *in præſenti*, when the teſtator had *expreſſly* deviſed the annuity, to be bought with it, equally between them, *after* the *death* of the mother.

Supra. 351.

Hawes v. Warner. 2 Vern. 477. Sc. 1 Brown's Ca. Parl. 210.

So, where the teſtator, *K*, by his will, mentioned, that *he computed* that the ſurplus of his perſonal eſtate, his debts and funeral expences being thereout firſt paid, would

would amount unto 5800*l*; and, *then*, distributed the 5800*l*. in ſeveral pecuniary legacies *amongſt* his grand-children, and willed that, if his perſonal eſtate fell ſhort, they ſhould abate in proportion; but, that if the ſaid ſurplus amounted to more, ſuch ſurplus ſhould go to his ſaid grand-children, in the ſame proportions as he had deviſed the 5800*l*: and, by the ſame will, deviſed to *N.* and *J*, two other of his grand-children, ſeveral houſes and warehouſes then mortgaged for 1400*l*: the queſtion was, whether the mortgage ſhould be paid out of the perſonal eſtate, for, if ſo, the ſurplus would not amount to 5800*l*. as the teſtator had computed it? And it was reſolved, that the deviſe, not being of 5800*l*. *certain*, but, of the *ſurplus* after his debts and funeral paid, which he *computed* at that ſum, if he was miſtaken in his computation, *that* would not ouſt the deviſee of his equity; for, it being mentioned, that he computed the ſurplus would be 5800*l*. after debts and funeral paid, which implied that he intended his debts, of which the debt by mortgage was one, ſhould be paid out of the perſonal eſtate, it muſt be ſo decreed.

S. 2. Eq. Ca. Abr. 493. Ca. 3. 552. Ca. 4. Viner. vol. 4. p. 468. Ca. 9. vol. 8. p. 442. Ca. 5.

Although the mortgagor deviſe the eſtate, with the incumbrances thereupon, yet, if there be no other words, ſhewing his intention to exonerate the *perſonal eſtate* from

payment of the mortgage-money, *that* fund must be first applied, to discharge it.

Serle *v.* St. Eloy. 2 Will. 386.

Thus, where one, seised in fee of lands that were in mortgage, and, likewise, seised in fee of other lands, devised his lands to *S.* at her age of twenty-one, subject to the incumbrances that were thereupon; and ordered, that the rents and profits of the premises, should, during the infancy of his said grand-daughter, be paid to her father for her sole use, and devised other lands to trustees, in trust, to pay the testator's debts. It was insisted that, the lands, in *G*, being devised subject to the incumbrances thereupon, the devisee must take them *cum onere*, and be contented to pay off the mortgage. But the court held, that the devise of the estate, subject to the incumbrances thereon, was no more than what would have been implied, for, the testator could not devise it otherwise: but, when the testator devised *other* lands, to pay his debts, this must be intended *all* his debts, and, consequently, the debt, by mortgage, was part of those debts, which were to be paid off out of the money, arising by sale of the trust-estate.

And, if there appear, upon the face of a will, a *clear* intention, in the testator, to give lands mortgaged, free from the incumbrance thereupon, even the real estates, de-

ſcended upon the heir, ſhall be applied in diſcharge thereof.

Thus, in the caſe of *Galton* v. *Hancock*, where the defendant's late huſband, being ſeiſed in fee of an eſtate and having borrowed a ſum of money, gave a bond for it, dated *May* 12th 1724, and a mortgage for the ſame ſum, on the 13th *June* following, and, on the 11th *December* 1728, made his will, by which he deviſed the eſtate in fee, which he had thus mortgaged, and alſo an eſtate for three lives, to the defendant, his wife, and made her ſole executrix. In 1734, the teſtator *purchaſed* one moiety of the reverſion in fee of the *leaſehold eſtate*, and the other moiety in 1737, and died ſoon after without making any alteration in his will. The bill was brought by the plaintiff, the heir at law, to have the deeds and writings of the leaſehold eſtate, the reverſion in fee of which was purchaſed by the teſtator *after* making his will, and for an account of the perſonal eſtate; the plaintiff inſiſting, that the eſtate deſcended was not liable to pay the mortgage, and endeavouring to throw the burthen upon the defendant, to be diſcharged out of the perſonal aſſets, and, if thoſe ſhould be deficient, out of the eſtate deviſed to her. For the defendant, it was argued, that, if the perſonal eſtate was not ſufficient to pay the mortgage, the eſtate,

Galton v. Hancock. 2 Atk. 424.

deſcended upon the plaintiff, ſhould make up the deficiency, and that the eſtate deviſed to her ſhould not be affected, while the real aſſets were ſufficient. On the firſt hearing of the cauſe, the Lord Chancellor obſerved, that, it having been admitted that the purchaſing the reverſion, *after* making the will, was clearly a revocation *pro tanto*, the main queſtion was, whether, where a real eſtate was *deviſed* with an incumbrance, and another *deſcended* upon the heir, the deviſee was intitled to have the eſtate exonerated? And his Lordſhip was of opinion, that the deviſee was not ſo intitled, in a court of equity.

But, this cauſe coming on again, upon a rehearing, it was argued for the plaintiff, that, here was no creditor before the court, and, therefore, the caſe came naked, and ſimply on the proper equity between a deviſee and an heir at law; that, the deviſed eſtate was liable in two capacities; firſt, as it was ſubject to the mortgage; ſecondly, under the ſtatute of fraudulent deviſes; that, there were many caſes where the turn of the ſcale was given to an heir at law, for the *ſake* of the heir at law, but, it had not been ſhewn, that equity had taken the burthen from the *hæres factus*, where the ſcale was equal, and, thrown it upon the *hæres natus*; that, they conſidered it in too narrow a view, without reflecting how the will had given

it,

it, and what were the circumſtances; that, if it appeared it was the teſtator's intention that the deviſee ſhould take it unencumbered, there was an end of the queſtion; that, it was impoſſible that the teſtator could intend ſhe ſhould take it diſencumbered, for, he ſaid, "after all my juſt debts are ſatisfied, *then*, I give to my wife, this eſtate," which words ſhewed, ſhe was to pay the debts in the firſt place; afterwards, by another independant clauſe, he gave her all other eſtates real and perſonal; that, it was clear, from the words, that it was the intent of the teſtator to give it, ſubject to this burden, and the law charged it in a double capacity; and, therefore, it would be abſurd to diſcharge it, contrary to the intention, and contrary to the effect of the law, *vide* the caſe of *Warrington* v. *Lee Sel. Ca. Ch.* in Lord *King's* time 39; that, he, that knew he had given her all, ſubject to his debts, could not but know, that this eſtate was equally ſubject, as the law had made it ſo; that, the deviſee was ſubject *here* by the particular intention, the heir, only, by a remote operation of law; that, the ſtatute of fraudulent deviſes was not applicable to the preſent caſe, becauſe the ſtatute had no lien, upon debts ariſing from the contract of the parties, but, upon general debts, only, of a teſtator.

Quære where, for not there, nor in that reporter.

After Lord *Hardwicke* had taken a twelve-months time to conſider the caſe, he gave judgment. His Lordſhip ſaid, the principal queſtion was, whether the defendant was intitled to have the mortgage upon the lands, deviſed to her under the will of her huſband, exonerated out of the real aſſets deſcended upon the plaintiff, the heir of the teſtator? This would depend upon two more particular queſtions; firſt, whether there were any words, in the will, to throw this upon the heir at law? Secondly, whether, according to, or, in conſequence of, thoſe rules which had been eſtabliſhed in equity, the defendant ſhould prevail, to have the mortgage, on the eſtate deviſed to her, exonerated out of the real aſſets, deſcended on the plaintiff.

The teſtator, in his will, ſat out with a deſire, that all his debts might be paid in the firſt place, and concluded with a general reſiduary deviſe to the defendant, whom he made his executrix. On the part of the plaintiff, it had been inſiſted, that the introductory clauſe in the will, was ſufficient to charge the defendant with the incumbrance upon the eſtate deviſed to her, and, that ſhe ought to take it *cum onere*. So he thought it would have been, with regard to creditors, but it was not ſufficient to fix the *onus* or burthen upon the legatee, or, to make

make a variation, with regard to the different funds out of which the debts were to be paid, or, to tranſpoſe the order in which the funds were to be applied for that purpoſe; for, theſe clauſes, in wills, had received ſuch a conſtruction, merely, for the aid and aſſiſtance of creditors, that they might not loſe their juſt debts.

As to part of the real eſtates, deviſed to the wife, the will was clearly revoked, and muſt be taken as if they never had been deviſed; his Lordſhip meant thoſe which were only *pur autre vie*, at the making of the will, and the inheritance of which was purchaſed in, by the teſtator, afterwards. But, it would ſound extremely harſh, in a court of equity, if he ſhould ſtrain to charge the deviſee with this debt, and, by that means, leſſen, even the eſtate which remained to her, under the will, when, clearly, the intention of the teſtator was, to give her the whole, and totally to diſinherit the heir.

The ſecond queſtion was a new one, and was never before brought in judgment; his Lordſhip would conſider it in two lights: firſt, how it would have ſtood, in caſe this had been a general debt, by bond or covenant, wherein the heir had been bound, without any mortgage to ſecure it; ſecondly,

condly, whether the mortgage would, in this caſe, make any difference.

There were two periods of time which would be material; how it would have been at common law, before the ſtatute of fraudulent deviſes, and how, ſince; at common law the deviſee was not liable to the demand, becauſe, the deſcent was broke: the rule of equity, before the ſtatute, did not differ from the rule of law, unleſs there were ſome particular circumſtances in the caſe. This court had often been attempting, before the ſtatute, to make a deviſee liable to ſpecialty debts, but was not able to come at it, which was the occaſion of the ſtatute.

The heir, before the ſtatute, would have had the benefit of the perſonal eſtate, in that court, in eaſe of the real; but, if there was no perſonal eſtate, the heir could have no relief, not ſo much as, a contribution from the deviſee.

The next queſtion was, upon the operation of the ſtatute, abſtracted from the mortgage in this caſe. By force of the ſtatute, the deviſee was made liable, at law, and the action muſt be brought, jointly, againſt the heir and deviſee; what judgment was to be entered up in this caſe? It had been inſiſted,

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by the defendant's counſel, that, there ought to be two diſtinct judgments; namely firſt, that the *heir* ſhould make ſatisfaction, and, if *he* had not ſufficient aſſets, *then*, that the *deviſee* ſhould do it. But there had been no precedent of any judgment, in this action, cited in ſupport of this; but, then, it had been ſaid, that the only reaſon why the ſtatute directed the heir and deviſee to be joined in the action, was, becauſe, if the heir had not aſſets enough, *then* judgment might be entered againſt the deviſee. But this was not concluſive, for, his Lordſhip took the proviſo, in the act, to be introduced for the benefit of the creditors, merely, without any regard either to the heir or deviſee; for, the enabling clauſe intitled the creditor to a new formed writ, and to bring a new action, otherwiſe, there might have been a colluſion, between the deviſee and heir at law, to play off the will, or not, juſt as it ſhould ſuit them beſt; therefore, it was a neceſſary and wiſe proviſion of the act, to join the heir and deviſee in the action, to ſecure the creditor at all events.

His Lordſhip ſaid, he had directed the ſolicitors, on both ſides, to ſearch for precedents of judgments, at common law, on this ſtatute, but they had not been able to find any; the reaſon muſt be, that the proceedings in this court were more expeditious; for, here, they might have a ſale

directed,

directed, as they had both heir and executor before the court.

There were three printed caſes upon this action, one in *Clif*'s Entries 243, another in *Lilly*'s Entries 145, (which was a better book,) *viz*, the caſe of *Joſeph* v. duke and dutches of *Hamilton*, in the exchequer, but, no plea or judgment were mentioned; the third was in *Lilly*'s Entries 529. 7 *Ann.* but there likewiſe was no plea or judgment, or any entry of it in the office. In all theſe precedents, the writ charged the heir in the *debet* and the *detinet*, and ſo it was, in all actions againſt co-heirs. According to the known rules at law, the judgment muſt follow the writ and count, therefore, his lordſhip concluded, the judgment, here, muſt be of both, and referred to 3 *Co.* 13, 14, where, the reaſon for a judgment againſt both the heirs, is fully ſet forth.

There was another conſideration, which was, that, from the nature and form of the judgment itſelf, there could not be two diſtinct judgments; *vide Plow.* 433. *Davy* v. *Pepys*, where there was a precedent of a judgment at large againſt co-heirs. The lands deſcended were to be delivered to the creditor, upon the execution, at a certain annual value, until his debt was ſatisfied; if ſo, when could the ſecond judgment take place?

place? For, you could never ſay, that this might not be ſatisfied out of the real aſſets of the heir, ſince the judgment was for the creditor to hold, *quouſque debitum ſatisfactum fuerit.* What was the rule in equity? Why, in caſe of a debt by ſpecialty, that the perſonal aſſets ſhould be firſt applied, and *if*, deficient, then the heir ſhould be charged for aſſets deſcended. His Lordſhip likewiſe ſaid, that no caſe had been cited at the bar, but there was one which had ſome reſemblance, *viz.* *Gawler* v. *Wade.* It was ſaid there, by Lord *Cowper*, that it was the act of parliament made this aſſets in the deviſee's hands, and, *that* requiring the heir to be made a defendant, you muſt follow the remedy therein preſcribed, and this bill in equity, was, as an action at law; but, Lord *Cowper* ſaid nothing, as to a contribution between the heir and deviſee. There were two caſes in which this point had been determined; namely, *Saville* v. *Saville* before Lord *King*, and Lord *Conway*'s caſe. He would add another caſe, *viz.* *Pill* v. *Raymond*, *January* 27, 1734. before Lord *Talbot.* There, a new bill was brought, after a long courſe of proceedings, to have ſatisfaction out of aſſets deſcended upon the heir at law; and, if that ſhould be deficient, then, an account was to be taken of the deviſed eſtate; which ſhewed his Lordſhip's opinion, as to the order in which the aſſets were to be marſhalled.

Gawler v. Wade. 1 Will. 99.

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He took it, that the notion of contribution, in the caſe of *Gawler* v. *Wade*, was not well founded; for, it was only ſtarted by counſel, but was not ſupported by any authority.

The ſtatute of fraudulent deviſes was made, merely, for the ſake of creditors, and not at all in favour of heirs at law. The enacting clauſe made wills void, againſt ſuch creditors, but left the law, as it was before, with regard to heirs. In this caſe, it would be contrary to the plain intention of the teſtator to make the deviſee, the wife, liable to the debt, ſo that ſhe ſhould, in whole, or, in part, be defeated of her legacy.

The ſecond queſtion was, whether, there being a mortgage upon this eſtate deviſed to the defendant, the wife, would make any alteration? It muſt be admitted, that this was a debt by ſpecialty, and that the land was only regarded as a pledge or ſecurity for the money, in this court.

The mortgagee might take his remedy, indeed, againſt the executor or againſt the heir, at his election; but, it muſt likewiſe be admitted, that this election of the mortgagee would not determine, which fund ought properly to be charged, or vary the right, as to thoſe funds.

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This was determined originally in favour of the heir, for theſe reaſons; becauſe, the heir was in the ſeat of the anceſtor, and, whilſt the ancient tenures ſubſiſted, was obliged to perform the ſervices.

The firſt executions were *fieri facias*, and *levari facias*, which affected chattels, only, but did not take the land; and ſo tender were they anciently of landed eſtates, that, even in the caſe of the crown, *if* the goods and chattels of the king's debtor were ſufficient (and ſo could be made appear to the ſheriff,) whereupon he might levy the king's debt, *then*, ought not the ſheriff to have extended the lands and tenements of the debtor, or, of his heir. And lord *Coke*, in *Harbert's* caſe 126, gave the reaſon why the lands of the king's debtor were liable to the king's execution; namely, becauſe, "*Theſaurus regis eſt pacis vinculum, et bellorum nervi*;" and, therefore, the law gave the king full remedy for it. He might have added another reaſon, why this judgment was in favour of the heir; *viz*, becauſe, otherwiſe, it muſt have been againſt the perſon of the heir, and *this* was to diſcharge and exonerate his perſon. 2 Inſt. 18, 19.

Here it was that this court ſtepped in, and founded an equity upon it, by directing the perſonal eſtate to be firſt applied, in favour of an heir; and, they were not tied down to the

the rules at law, becauſe, this court could bring both heir and executor before them, at the ſame time.

Ch. Ca. 271. *Corniſh* v. *Mew*, was the laſt caſe, wherein the court refuſed to apply it, in favour of an *hæres factus*; this was in the time of my Lord *Nottingham*, indeed, but, he believed it was determined by the Maſter of the Rolls, or, ſome judge ſitting for his Lordſhip; becauſe Lord *Nottingham* had determined it expreſsly, contrary in a caſe before, which was the firſt caſe, where a *hæres factus* had this determined in his favour, *viz*, *that perſonal aſſets ſhould be applied in exoneration*; but, this was in the caſe of an *hæres factus* of the *whole* real eſtate. The firſt caſe, where it was determined, in favour of a deviſee of *part* of the real eſtate, only, was the caſe of *Pockley* v. *Pockley*. He need not mention any more caſes, for the opinion of that great man, Lord *Nottingham*, had been followed ever ſince.

Hayes *v.* Hayes. 1 Ch. Ca. 223. *Quæ.* if this the caſe.

Supra. 334.

By the will, in the preſent caſe, the land was given to the wife, the deviſee, which muſt mean, *effectually*; for, if given ſubject to the mortgage, the whole benefit would be drawn from the deviſee, and the will rendered ineffectual.

Now, if the deviſee was intitled to be exonerated, ſuppoſe there were ſimple contract

tract creditors, and a ſpecialty creditor, (as the mortgagee in this caſe was,) exhauſted the perſonal aſſets; had not the ſimple contract creditor an equity to ſtand in his place, and to come upon the real aſſets; and was not that the conſtant courſe of the court?

It was agreeable, likewiſe, to the reaſon and equity of the ſtatute againſt fraudulent deviſes, which left it in full force, againſt the heir at law.

In the laſt place, his Lordſhip thought this opinion would co-incide, intirely, with the intention of the teſtator.

Here came in the objection of the moſt weight, on the part of the plaintiff; namely, that this was plainly an eſtate deviſed with a lien upon it, which ſhewed, that the teſtator meant ſhe ſhould take it *cum onere*; ſo that, at leaſt, it might be ſaid, in favour of the plaintiff, there was intention againſt intention. But, if an inference ſhould be drawn, from a teſtator's mortgaging particular lands and deviſing them ſo mortgaged, that he intended theſe lands ſhould be liable, in the hands of the deviſee, to this burden, that would equally hold againſt perſonal aſſets being firſt applied; and it was the conſtant direction of the court, that the mortgaged eſtate ſhould be conſidered, only, as a pledge

for money; but, as to the proper application of the funds for payment of that debt, it was left, juſt, as it was before.

It was equal to the creditors to go firſt againſt the *lands deviſed*; and, if the court would, in that caſe, conſtrue it in favour of the deviſee *againſt* the heir at law, *when*, by circuity, the ſimple contract creditors ſtood in the place of the ſpecialty creditors; *then*, what reaſon could be aſſigned, why the deviſee ſhould not have the benefit, *directly*, againſt the heir at law.

Supra. 343. The caſe of *Clifton* v. *Burt* proved, that even *general* pecuniary legatees were to be preferred to an heir at law; much more then, ought a *ſpecific* deviſee of land; and this too, was analogous to the rule of law; for, every deviſee was in nature of a purchaſor: and ſo it was laid down in *Harbert's* caſe 3 *Co.* 126. *viz.* that the heir ſhould not have contribution againſt any purchaſor, although, *in rei veritate*, the purchaſor came to the land without any valuable conſideration; for, the conſideration of the purchaſe was not material, in ſuch caſe.

In the ſearch his Lordſhip had ordered to be made for precedents, there was but one, which reſembled this caſe, and that, indeed, Supra. 356. came very near, *(viz.) Serle* v. *St. Eloy*.

His

His Lordſhip, having done with the caſes, ſaid, he ſhould now take notice of the obſervations of the counſel, on both ſides.

The firſt obſervation was, on the part of the plaintiff, that this doctrine would extend to level all deviſes; for, according to this rule, if a teſtator ſhould have mortgages upon different eſtates for different ſums, and deviſed thoſe eſtates to different perſons, a deviſee of the eſtate which had the largeſt mortgage upon it, and was leaſt in value, would be intitled to come upon other deviſees, for a contribution; but, this was not warranted by the caſe of *Carter* v. *Barnardiſton*.

Carter *v.* Barnardiſton. 1 Will. 505.

The other obſervation was, on the part of the defendant; namely, that, if ſhe was not intitled to have the eſtate, deſcended, applied to diſcharge the mortgage, it would have this conſequence; that if the mortgagee ſhould bring his action againſt the heir, and recover, which he might certainly do, the heir would *then* be intitled, in that court, to have ſatisfaction againſt the land deviſed, as originally ſubject to the mortgage; and this was rightly argued, for, it was admitted, that the election of the creditor would not determine what ſhould be, ultimately, the fund which ſhould be charged. It would be a moſt abſurd conſequence, if the heir

at law ſhould, in this caſe, draw away, from the deviſee, the benefit which the teſtator meant to give her, by this deviſe, by making her bear the burthen, contrary to the teſtator's intention, and, at the ſame time, take beneficially himſelf, when the teſtator, *clearly*, intended, to give away the whole from him.

Theſe were the reaſons which induced his Lordſhip to alter his opinion. He might, at firſt, be influenced by the appearance of hardſhip in this caſe on the part of the heir; but, the rule of a court of equity, in marſhalling aſſets, was of great conſequence to the practice of the court, and ought to countervail any arguments of hardſhip to particular perſons: beſides, upon mature deliberation, he did not think the caſe of the heir at law ſo hard as he did at firſt; becauſe, it was not the intention of the teſtator, that the heir ſhould take any part of his eſtate, and, it was a mere accident that threw a part upon him, *(viz.)* the ignorance of the teſtator, that it was neceſſary, after purchaſing in the fee of theſe eſtates *pur autre vie*, to re-publiſh his will, to make them paſs to the defendant, the widow. The former decree was accordingly reverſed totally, as to this point.

And here we muſt remark, that even a perſonal covenant to pay mortgage money, will

will not make the perſonal aſſets of the covenantor liable, in equity, for it, where the money was originally advanced to another perſon, and not to the covenantor; for, the court will always take into conſideration, whoſe debt it is, and make the perſonal eſtate, benefited by the loan, liable in the firſt inſtance, and, not the ſecurity.

Bagot *v.* Oughton. 1 Will. 347.

Thus, where Sir *Edward Bagot* married the daughter and heir of Sir *Thomas Wagſtaff*, and, for raiſing part of Miſs *Wagſtaff*'s portion, Sir *Thomas* mortgaged part of his eſtate for 3500 *l*, and then died, leaving lady *Bagot* his daughter and heir. Lady *Bagot*, afterwards, joined with her huſband, Sir *Edward*, in a deed and fine, whereby, ſhe ſettled her eſtate on her huſband and herſelf, and the heirs male of the body of her huſband. The mortgagee wanting his money, Sir *Edward* joined in an aſſignment of the mortgage, and covenanted that he or his wife, or one of them, would pay it. Then Sir *Edward* died, leaving Sir *Walter* his ſon by his wife: his lady, afterwards, married with the defendant colonel *Oughton* and died. And the queſtion being, whether, by reaſon of the covenant from Sir *Edward Bagot* for the payment of this 3500 *l*, mortgage money, his perſonal eſtate ſhould be liable to pay the ſame? It was held that this covenant by Sir *Edward*, would not make his perſonal eſtate

liable to go in eaſe of the mortgaged premiſes; for, the debt being originally Sir *Thomas Wagſtaff*'s, and continuing to be ſo, the covenant, upon transferring, was, only, as an additional ſecurity for the ſatisfaction of the lender, and, not intended to alter the nature of the debt.

Evelyn v. Evelyn. 2 Will. 591.

And the law will be the ſame if money be borrowed, on mortgage, by virtue of a power to charge an eſtate; for, in ſuch caſe, the heir takes the land *cum onere*. Therefore, where *George Evelyn*, the defendant's father, and grandfather to the plaintiffs, had three ſons, *John*, *George*, and the defendant, *Edward Evelyn*. *George* the father, (being tenant for life remainder to his eldeſt ſon *John*, in tail male, of part of the premiſes,) together with his eldeſt ſon *John*, on the 20 *October* 1698, by deed and recovery, ſettled certain eſtates in ſtrict ſettlement, with a power to *George* the father, by deed or will, to charge, by leaſe, mortgage, or otherwiſe, the premiſes limited to himſelf for life, with raiſing, or paying any ſum, not exceeding 6000 *l*. *George* the father, in purſuance of the power, mortgaged part of the ſaid land for 1500 *l*, for the term of 1000 years. This mortgage, afterwards, by meſne aſſignments, became veſted in Sir *Thomas Pope Blunt*, with a covenant, from *George Evelyn* the ſon, for payment of the mortgage money, and, on the

the ſame aſſignment, Sir *Thomas*, the mortgagee, covenanted to re-aſſign to *George Evelyn*, the ſon. Afterwards *George Evelyn*, the father, died; then, *John Evelyn*, the eldeſt ſon, died without iſſue: upon which, *George*, the ſecond ſon, entered upon the premiſes compriſed in the ſettlement, and died inteſtate, leaving the defendant *Mary* his widow and three daughters. Then, *Edward Evelyn* and his ſon, (the next remainder-man in tail,) inſtituted a ſuit againſt Mrs. *Evelyn*, the mother, (afterwards married to governor *Bohun*,) being the adminiſtratrix of her former huſband, *George Evelyn*, praying, that the perſonal eſtate of her late huſband ſhould be applied towards paying off the mortgage of 1500 *l*, and, in exoneration of the real eſtate. But, it was held by the Lord Chancellor, aſſiſted by the Lord Chief Juſtice *Raymond*, and the Maſter of the Rolls, that the perſonal eſtate of the ſon ſhould not be applied to pay off this mortgage, made by the father: becauſe, the charge was made by the father, in purſuance of the power contained in the ſettlement; and, as he had ſuch power, the defendant, *Edward*, muſt be contented to take ſuch land *cum onere*: and, notwithſtanding that the ſon did, afterwards, on the aſſignment to Sir *Thomas Blunt*, covenant to pay the mortgage money, yet, ſince the land was the original debtor, this covenant from the ſon

would be conſidered, *only*, as a ſecurity for the land.

The ground of theſe determinations is, that, in ſuch caſes, the covenant is conſidered, in equity, as a mere collateral ſecurity, not to be reſorted to, unleſs the principal ſecurity, which is the land, fails. For, the land holder, in truth, enters into ſuch covenant, relying upon the lands enabling him to diſcharge it; and, the money raiſed, does not *increaſe* his perſonal eſtate, but, is to exonerate the reſt of the real eſtate. And, therefore, in the caſe of the earl and counteſs of *Coventry*, where *Gilbert*, the late earl of *Coventry*, on his marriage with the daughter of Sir *Strenſham Maſters* (the earl being but tenant for life, with a power of making a jointure of lands, not exceeding 500 *l*, *per annum*, on any wife he ſhould marry,) covenanted, in conſideration of the intended marriage, that he, or his heirs, would, after the marriage, according to the power given him by his father's will, or otherwiſe, ſettle 500 *l*. *per annum* on his wife for her jointure; and, it being in proof, that the late earl directed his ſteward to look over the rent-rolls for a fit part of the eſtate to make good the jointure, and that, afterwards, the jointure-deed was ingroſſed, but not executed; though this depended, only, on a covenant, yet, the jointure of *land* being the

Earl and counteſs of Coventry. 2 Will. 222.

the *chief thing* in view; the decree was, that the *land* ſhould be ſettled, and the covenant not made good out of the *perſonal eſtate*.

And ſo, in the caſe of *Edwards* and *Freeman*, though the wife's jointure and the daughter's portion were ſecured by articles, which were never compleated by a ſettlement; yet, thoſe articles being to ſettle lands, and the covenantor leaving lands ſufficient to anſwer them, it was decreed, that the daughter's portion ſhould be raiſed out of the lands, and that the perſonal eſtate of Mr. *Freeman*, the covenantor, ſhould not be applied in exoneration thereof. But it is to be obſerved that, in the latter caſe, particular lands were agreed to be ſettled, and, conſequently, that the covenant was a lien upon thoſe lands.

Freeman *v.* Edwards. Ibid. 435.

CAP. XIII.

Of the payment of Intereſt of Money lent on Mortgage, &c.

BY the 12th. *Ann. ſt.* 2. *c.* 16. *ſec.* 1. all bonds and aſſurances for the payment of any principal money, to be lent upon uſury, whereupon there ſhall be reſerved, or, *taken*, above five pounds in the hundred for a year, are declared utterly void.

3 Atk. 154. Upon this clauſe of the ſtatute, not only mortgages, where more than 5 *per cent.* is reſerved, will be void, but alſo mortgages, drawn only for 5 *per cent.* if the mortgagee *takes* above that ſum.

Stapleton *v.* Conway. 3 Atk. 727. It is ſaid to have been held by Lord *Hardwick*, that if a contract were made *in England* for a mortgage of a plantation in the *Weſt-Indies*, no more than legal intereſt might be paid; and that a covenant, in ſuch mortgage, for payment of eight *per cent.* intereſt would be within the ſtatute of uſury, not-

notwithstanding this were the rate of interest, where the lands lay.

But now this point is settled, by the 14 *Geo.* 3. *c.* 79. *s.* 2. whereby it is enacted, "that none of his majesty's subjects, in *Great* "*Britain*, shall be subject or liable to any of "the penalties or forfeitures, inflicted by the "12 *Ann*, by receiving or taking interest for "any sum or sums of money really and *bonâ* "*fide* lent on any mortgage, &c. of lands "in the colonies or plantations in the *West-* "*Indies, the securities for which are made and* "*executed in Great Britain*, so as the interest, "so to be received or taken, do not exceed "the rate of six pounds for one hundred "pounds for a year."

But, the statute of Queen *Anne* has no retrospect to contracts made previous thereto, for they may carry interest according to the interest allowed on agreements, at the time the debt was contracted.

Walker *v.* Penry. 2 Vern. 42. 78. 145. S. C. 1 Eq. Ca. Abr. 288. Sc. *Cont.* Pre. Ch. 50.

A distinction is made in Chancery, between an agreement, that the interest shall be raised if not punctually paid, and, for abatement thereof upon punctual payment. For, in the former case, it is considered as a penalty, which the courts of equity will relieve against; but, in the latter, as a condition, which must be strictly adhered to: in

3 Burroughs 1374, 1375.

in which caſe, the debtor cannot have relief, in equity, after the day of payment elapſed; becauſe, the abatement is to be upon a condition, which is not performed.

Jory *v.* Cox. Pre. Ch. 160. Barnard 481. Nichols *v.* Maynard. 3 Atk. Rep. 520.

Thus where, (before the reduction of intereſt to 5 *per cent.*) a mortgagee lent money at 6 *per cent.* but agreed in the deed that, if the money was paid within three months after it became due, he would accept of 5 *per cent.* The mortgagor not paying the money within the time, the queſtion was, whether he ſhould pay 5*l.* or 6*l.* *per cent?* And it was held, by the court, that intereſt muſt be paid at ſix: for, though relief was given againſt unreaſonable penalties, yet, this was not ſo, for the mortgagee might have refuſed to lend his money under 6 *per cent.*

Strode *v.* Parker. 2 Vern. 316. Holles *v.* Wyſe. 2 Vern. 289. Nichols *v.* Maynard. 3 Atk. 520.

But where, on a bill to foreclose a mortgage, the intereſt, by the deed, was to be 5 *per cent. per ann.* payable half yearly, and, if not paid by the ſpace of two months after the time of payment, *then*, to be raiſed to 5*l.* 10*s.* *per cent. per ann.* for increaſe of intereſt. The intereſt being run greatly in arrear, the queſtion was, after what rate it ſhould be computed, on redemption of the mortgage? And it was decreed to be computed at the rate of 5 *per cent. per ann. only:* for, where the intereſt was to be increaſed, if not paid

at

at the day, that was but in the nature of a penalty, and relievable in equity.

But, it ſeems, that if there be a covenant for payment of the additional one *per cent.* the court will not relieve againſt it.

Thus, where money was lent on mortgage at 5 *per cent*, and the mortgagor covenanted to pay 6 *per cent.* if he made default in payment of intereſt for the ſpace of ſixty days after the time of payment; the court decreed, that, from default made, the mortgagor ſhould pay 6 *per cent:* for, that this covenant was the agreement of the parties, and not to be relieved againſt as a penalty. *Quære*, if ſuch covenant muſt not be by a ſeparate deed, though I ſhould think, that would make no difference.

Marquis of Halifax *v.* Higgens. 2 Vern. 134.

Pre. Ch. 161. *Vid.* Howard *v.* Harris. Supra. 18. 98. 99.

And, if an indulgence be given by the mortgagee, ſuch agreement will be good to raiſe the intereſt, upon the ground of forbearance; ſuch additional intereſt not being conſidered, in that caſe, as a penalty, but, as a liquidated ſatisfaction fixed and agreed upon by the parties. So where a mortgage was given, in *Ireland*, to truſtees, by way of ſecuring debts to creditors, and no money actually paſſed, but the ſum nominally lent was to be paid by inſtalments; an agreement that the intereſt of thoſe ſums ſhould riſe

Burton *et al.* *v.* Slattery. 3 Brown's. Parl. Ca. 68.

riſe, on non-payment, at the time appointed or within three weeks after, from five to eight *per cent*, was held good, upon an appeal to the Houſe of Lords.

Brown *v.* Barkham. infra.

And, in a ſimilar caſe, where a long arrear of intereſt had accrued, and the mortgagee had ſent an account thereof to the mortgagor, who returned an anſwer, admitting the account, *deſiring forbearance*, and promiſing to make ſatisfaction for the ſame. Lord Chancellor *Parker*, allowed the additional one *per cent*, reſerved, as a ſatisfaction; ſaying, that though the proviſo, obliging the party to pay 6 *per cent*, was generally looked upon as a penalty, and, *in terrorem*, and therefore to be relieved againſt, if, only a very ſhort lapſe had happened; yet, it might not be relievable againſt in caſe of a long arrear of intereſt; and, that if no reſervation of 6 *per cent*. had been made, and a great arrear of intereſt had incurred, the court, on ſuch a promiſe, in writing, to make a ſatisfaction for forbearance, would have given the mortgagee ſome allowance in that reſpect.

We muſt obſerve, in this caſe, that the *mortgagee had, originally, made himſelf judge* what recompence he ſhould have, in caſe the agreement for payment of intereſt was not performed, and the *mortgagor had acqui-*

eſced

eſced therein; and, therefore, there would have been no equity in the court interfering to alter it.

It is a rule and courſe of the court of Chancery, on reference to a Maſter to ſtate an account upon a mortgage, that all money paid as ſurety, ſhall be reckoned as principal money from the time of payment, and intereſt allowed thereupon accordingly.

Morley *v.* Elwis. 2 Keb. 376.

So, likewiſe, the practice is, that, if the mortgagee aſſign the mortgage, with the concurrence of the mortgagor, *all money*, really paid by the aſſignee that was due to the mortgagee, ſhall be conſidered principal, and that the aſſignee ſhall have intereſt upon the intereſt *then* due, *and paid by him, as well as, upon the principal* originally lent.

Smith *v.* Pemberton. 2 Ch. Ca. 67, 68. Ibid. 258. 1 Vern. 169. 2 Vern. 135. Bacon. Abr. 658.

But, it is otherwiſe, if the aſſignee hath not paid the money, and the aſſignment be only colourable, in order to load the mortgagor with compound intereſt.

Ibid 68. 1 Eq. Ca. Abr. 329. 1.

The account between the mortgagee and aſſignee, will not conclude the mortgagor.

Thus where, upon the aſſignment of a mortgage, the debt was ſtated between the mortgagor,

Earl of Macclesfield *v.* Fitton.

1 Vern. 168. Infra.

mortgagor, the mortgagee, and ſome of the co-heirs that were looked upon to have a right to the redemption; it was inſiſted, that this ought to conclude the mortgagor, as a ſtated account: but he, being no party thereto, that was over-ruled by the court.

Aſhenhurſt *v.* James. 3 Atk. 271. Porter *v.* Hubbart. 3 Rep. Ch. 78.

But, here we muſt particularly remark, that an aſſignment, to give title to intereſt on intereſt, muſt be made with the concurrence of the mortgagor: for, where it is aſſigned without his aſſent, the aſſignee muſt take it *only* upon the ſame terms with the aſſignor.

Earl of Macclesfield. *v.* Fitton. 1 Vern. 168. Supra. 383.

Thus, where the bill was to have the redemption of a mortgage of the manors of *B.* and *S*, in the county of *C*, which mortgage had been aſſigned to *F*, one point was; whether, there being great arrears due at the time of the aſſignment, which were paid by *F*, the money paid for intereſt, *then* in arrear, ſhould be reckoned principal as to him, and carry intereſt with it? And, it was inſiſted, for the mortgagor, that intereſt was never made principal, in ſuch caſe, unleſs the mortgagor had joined in the aſſignment; and the caſe of *Porter* and *Hubbart* was cited, where, in a like caſe, it was decreed, that intereſt ſhould be reckoned principal: but, the decree was reverſed in the Houſe of Lords; becauſe, the executor

Porter *v.* Hubbart. 2 Ch. Rep. 86. 3 Ibid. 80.

of

of the mortgagor was no party. But, the Lord Keeper ſaid, *that* precedent could not weigh much with him, he was of counſel therein, and it was hard in all its circumſtances. For, although he thought it reaſonable, that the intereſt paid upon the aſſignment ſhould be reckoned principal, yet, he would not now make a new precedent. However, his Lordſhip directed the defendant's counſel to ſearch for precedents, and ſaid, that, if they could find any one, he would follow it in this caſe; but no ſuch precedent could be found.

This rule admits of diſtinctions, in particular circumſtances.

Thus, where creditors procure a decree for ſale of an eſtate before a Maſter, and one, by conſent of all parties intitled to the eſtate (being confirmed the beſt bidder by authority of the court, all the incumbrancers agreeing he ſhall be purchaſor,) takes an aſſignment of all incumbrances, in this caſe, he will be a creditor of the mortgagor for the whole ſum, as well what he paid for intereſt due, as, for principal, together with intereſt upon the intereſt, their conſent being the ſame thing, as if they had been made parties to the aſſignment.

Aſhenhurſt *v.* James. 3 Atk. 271. Supra. 384.

1 Ch. Ca. 258.

It is ſaid, that, in Hilary vacation, a little before Eaſter term in the 26th and 27th *Car.* 2. the Lord Keeper declared it ſhould be the rule, that a mortgagee, on his mortgage being forfeited, ſhould have intereſt for his intereſt.

Gladman *v.* Henchman. 2 Vern. 135. Hill. 1690.

So, where a mortgage was made, in *June* 1678, for 450*l.* principal money, payable at the end of five years, and intereſt in the mean time half yearly; and, about two months before the five years were expired, the mortgagee, (no intereſt having been paid,) aſſigned the mortgage to the defendant in conſideration of 560*l.* being ſo much due for principal and intereſt; the queſtion was, whether the intereſt then due ſhould carry intereſt? It was objected, that the mortgagee ought not to have aſſigned until the five years were expired; *ſed non allocatur*, for the mortgage was forfeited long before, by non-payment of the intereſt; and the 560*l.* was decreed to be paid, with intereſt, from the time of the aſſignment.

Procter *v.* Cooper. Pre. Ch. 116. Trin. 1700.

But this rule, if ever made, ſeems to have been laid aſide ſoon afterwards; for, where *G*, in 1641, made a mortgage in fee of lands worth about 30*l.* *per ann.* to *C.* to ſecure 300*l*; in 1652, the mortgagee took poſſeſſion, and, in 1660, deviſed the lands to *A*; in 1680 (which was five years after the

the rule above mentioned is ſaid to have been made) the deviſee brought a bill to foreclose. The wife of the mortgagor had recovered a third part, as dower, againſt the mortgagee, ſo that the profits did not anſwer the intereſt of the money, which was then 8 *per cent.* and there had been infancies on the plaintiff's part for ſeveral years. The Maſter of the Rolls decreed the plaintiff to redeem, and pay 8*l. per cent. only*, that being then legal intereſt; and ſaid, that, though the profits were not ſufficient to anſwer the intereſt, yet, the arrears could not carry intereſt, although the coſts and charges muſt.

A Maſter's report, computing intereſt, makes that intereſt, principal, and to carry intereſt; for, a report is as the judgment of the court and appoints a day for the payment, carrying on intereſt to that day; and the party's diſobedience to the court, in not complying with the time of payment, ought to ſubject him to intereſt.

Bacon *v.* Clerk. 1 Will. 478. Sc. Pre. Ch. 500. 2 Eq. Ca. Abr. 530. 9.

But, the report muſt be confirmed; for, where *A*, the defendant, inſiſted, that 800*l.* was owing to him, and, upon the Maſter's report, only 180*l.* appeared due; the court ordered intereſt for that ſum, from the time of confirming the report abſolute, *and*

1 Will. Rep. 453. 480. Kelly *v.* Lord Bellew. 1 Brown's Parl. Ca. 202. Ibid. 566.

Attorney General *v.* Iſlington Overſeers *et al.* 1 Will. Rep. 376. 7. 2 Eq. Ca. Abr. 530.

not before; becauſe, until then, it was not any liquidated ſum.

And, although the report *be* confirmed, yet, if the ſuit be for a ſale, and not to foreclose, intereſt ſhall not carry intereſt, if there be other mortgagees, and bond creditors, parties thereto.

Harris *v.* Harris. 3 Atk. 722.

Thus, where the plaintiff, a mortgagee, brought a bill, in conjunction with ſeveral bond creditors, againſt the heir at law of the mortgagor, for a ſale of the mortgaged premiſes, and had a decree accordingly, with a direction to pay the mortgagee his principal and intereſt, in the firſt place: the Maſter made a report of a ſtated ſum due, which was confirmed; the mortgagee then moved, that the Maſter might compute ſubſequent intereſt and coſts upon the ſum reported due. There was not near enough ariſing from the ſale, to pay the ſecond mortgagee and the bond creditors. The reſt of the creditors and the mortgagor oppoſed this motion, and endeavoured to ſhew a difference between the preſent bill and a bill of foreclosure, inſiſting, that, in the latter, the court directs the Maſter to allow ſubſequent intereſt upon the ſum reported due, becauſe, it is a compenſation to the mortgagee for being kept out of his money, by the courts allowing time to the

mortgagor to redeem; but, that here a ſale was directed in the firſt inſtance, and the intereſt of the other creditors were concerned: therefore, it would be hard to give intereſt upon intereſt in favour of one creditor, to the prejudice of the reſt. And the Lord Chancellor allowed the diſtinction, ſaying, that it would be rather too much to give ſuch an advantage to the mortgagee over the reſt of the creditors, eſpecially, as the mortgage carried 5 *per cent.* and propoſed to the counſel, that, from the time of the Maſter's report being confirmed, it ſhould carry only 4 *per cent.* in which the plaintiff acquieſced.

It ſeems, in general, that an account, (though before a Maſter,) againſt an infant, on a bill to foreclose, ſhall not carry intereſt on intereſt.

Bennett v. Edwards *et al.* 2 Vern. 392.

So, upon a bill being brought, that an infant might redeem a mortgage, or be foreclosed; upon the hearing, it was decreed to an account, and that the infant ſhould pay what was reported due, unleſs he ſhewed cauſe to the contrary, within ſix months, after he became of age. A report was made, and confirmed, of 2600*l.* due; and upon a ſubſequent order being made, to compute intereſt from the report, the

Lord Keeper doubted, whether intereſt ought to be allowed for the intereſt.

And I ſhould apprehend, that, in ſuch caſe, generally ſpeaking, intereſt upon intereſt ought not be allowed againſt an infant; becauſe, one ground, upon which the court turn the intereſt into principal, is, by way of inflicting puniſhment on the mortgagor for non-performance of his contract, which motive ought not to operate againſt an infant. For, the ſame reaſon, on which the court indulges him with the privilege of ſhewing cauſe, after he comes of age, namely, his preſumed incapacity in the management of his affairs, which diſcharges him from any conſequences incurred by, or penalty inflicted on the ground of, negligence, operates equally againſt loading him with compound intereſt upon an account, when it may be preſumed, that the like imbecillity, which induces the court to indulge him with an opportunity of ſhewing cauſe againſt a decree of foreclоſure, or other decree charging his eſtate, likewiſe occaſions the non-payment of the intereſt. *Et vid.* the caſe of Sir *Redmond Everard* v. *Eliz. Aſton.*

2 Brown's Par. Ca. 56. Vin. vol. 12. p. 113. Ca. 47.

And if the decree were, that, on non-payment of what ſhould be reported due, the infant ſhould be foreclоſed, unleſs cauſe ſhewn

ſhewn to the contrary within ſix months &c. the caſe would be, ſtill ſtronger, againſt allowing intereſt upon intereſt. Firſt, becauſe, by ſuch decree, the mortgagee has the penalty which he annexed to the non-performance of the contract by the mortgagor, namely, the eſtate diſcharged from the condition. Secondly, becauſe, one ground, upon which the court turns the intereſt into principal, is, as a recompence to the mortgagee for the delay he receives, by reaſon of the indulgence given, by the court, to the mortgagor, in allowing time for redemption; which reaſon does not apply here, as, in the caſe of an infant, the foreclosure takes place immediately, but ſubject to be opened, within ſix months after he attains his age, if the infant's defence be miſtaken, or there be any irregularity on the part of the mortgagee.

But, here, we muſt remark an exception to this rule, as to infants, where an *account and report* are taken and made, in a cauſe, wherein an *infant* is *plaintiff*; for, there, the ſum will bear intereſt from the foot of the account; nothing being more certain, or eſtabliſhed, than, that a minor is bound and concluded thereby, unleſs he ſhew fraud, or error to his prejudice; for, it would be not only inequitable, but unreaſonable, to take from ſuch defendant the *benefit* of making

uſe of thoſe proceedings, which he is *forced into* by the infant, and, thereby, to ſubject him to the difficulty and expence of taking a new account.

Badham *v.* Odell an infant and Fitzmaurice his guardian. 4 Brown's Parl. Ca. 447.

So, where *Thomas Odell*, an infant, to whom the equity of redemption of a mortgage, for years, deſcended on the death of his father, (who had exhibited his bill, in the court of exchequer in *Ireland*, againſt the mortgagee and his aſſignee to redeem the premiſes, and for an account of the money due on the mortgage,) filed his bill of revivor; the cauſe was heard, and the court decreed, that it ſhould be referred to the remembrancer to ſtate and ſettle an account, who made his report, that 1883*l.* 18*s.* was due for principal *and intereſt*, which, there being no objections made, or exceptions taken thereto, was abſolutely confirmed. And the cauſe coming on for further hearing, it was decreed, that, upon the mortgagor's paying the ſum of 1883*l.* 18*s.* ſo reported due, *with intereſt for the ſame* from the time of the report being confirmed *abſolute*, the premiſes ſhould be re-conveyed, and all bonds and ſecurities delivered up.

Afterwards, *Odell* neglecting to pay the money reported due, or any intereſt for the ſame, the mortgagee, who had likewiſe had a ſuit depending, filed an amended and ſupplemental

ſupplemental bill, in order to have the benefit of the decree, by a ſale or abſolute foreclosure; and, therein, in regard the account of what was due, on the ſaid mortgage, had been ſtated in the former cauſe, prayed to have the benefit thereof, and that the account ſhould be taken, in his preſent ſuit, on the foot of the report or decree made in the former ſuit.

To this bill *Odell* put in his anſwer, and thereby, amongſt other things, admitted the former report, decree, and proceedings; but inſiſted, that, apprehending he was much aggrieved by thoſe proceedings, he choſe to have his bill, upon which the ſaid decrees were made, diſmiſſed, rather than ſubmit thereto. Afterwards, the cauſe came on to be heard, when the court declared, they were of opinion, that the defendant, the minor, was not to be concluded by the account taken in the ſaid former cauſe, but, that the plaintiff was intitled to an account, as between mortgagor, and mortgagee; and, therefore, decreed, that it ſhould be referred to the chief remembrancer, or his deputy, to audit and ſtate an account, between the plaintiff and defendant, on the foot of the mortgages and ſecurities in the pleadings mentioned, in which account, both parties were to have all juſt allowances.

From this decree, the mortgagee appealed, inſiſting, that the infant ought to be concluded by the account, taken in the former cauſe, on a bill originally brought by his father, revived, and carried on by himſelf, confirmed by ſubſequent orders of the court, and ſigned and inrolled; and, that he ought not to be permitted to wave, or vary the ſame, eſpecially, when neither fraud or error in the account was even ſuggeſted.

And ſo it was adjudged, as to that point, and the decree reverſed: and it was further ordered, that the account, taken upon the former decree, ſhould ſtand, with liberty for the infant to ſurcharge, or falſify the ſame, and that, in caſe of any ſurcharge, or falſification, the remembrancer ſhould deduct ſo much, as ought to be deducted, on account thereof; and that the remembrancer ſhould carry on the account, of the *ſubſequent intereſt, from the time of the confirmation of the former report*, for the ſum thereby reported due, after ſuch deductions made thereout as aforeſaid.

Co. Litt. 315. *a.*

So, likewiſe, a diſtinction is made, where an infant concerned, agrees to allow intereſt on intereſt, and a benefit accrues to him thereby, and it would be unjuſt to take it from the mortgagee, for, in ſuch caſe, it ſhall be allowed; as the law, at the ſame time

time that it protects the imbecillity, and indiſcretion, of infants from injury, through their own imprudence, enables them to do binding acts, for their benefit, and, without prejudice to themſelves, for the benefit of others; for the end of the privilege, being their protection, to *that object*, all the rules, and their exceptions, muſt be directed, and, *not* to give ſuch acts ſtability, would be turning their privilege of infancy, *againſt* themſelves.

Earl of Cheſterfield *v.* Lady Cromwell. 1 Eq. Ca. Abr. 287. 1.

Thus, where *J S.* mortgaged his eſtate to *C.* and then died, leaving *D.* his daughter and heir, who was an infant, and had nothing to ſubſiſt on, but the rents of the mortgaged eſtate. The mortgage having been ſuffered to run in arrear three years and a half, *C.* grew uneaſy at it, and threatened to enter on the eſtate, unleſs his intereſt might be made principal, upon which, *D*'s mother, with the privity of her neareſt relations, ſtated the account; and *D*, being then near of age, ſigned it, and it was admitted to be fair. It was reſolved, by the court, that, though, regularly, intereſt ſhould not carry intereſt againſt an infant, yet, in ſome caſes, and upon ſome circumſtances, it would be injuſtice, if intereſt ſhould not be made principal; and, the rather, in this inſtance, becauſe it was for the infants benefit, who, without

without this agreement, would have been deſtitute of ſubſiſtence.

Infra.

Beſides, in this caſe, the mortgagee might have obtained immediate payment, of principal and intereſt, by exhibiting his bill, to compel a ſale for payment of debts.

Brown *v.* Barkham. 1 Will. Rep. 652. Supra. 382.

But, in general, intereſt ſhall not carry intereſt, upon a mortgagor's ſigning an account, whereby, he admits ſo much due for intereſt; becauſe, that, of itſelf, does not ſhew any agreement, or intent, to alter the intereſt, or the nature of that part of the debt, or to turn it into principal; nor does it appear to have ever been ſo determined; for, it ſeems that, to make intereſt on a mortgage principal, it is requiſite there ſhould be a *writing* ſigned by the parties, *the eſtate, in the land, being to be charged therewith.*

Howard *v.* Harris. 2 Ch. Ca. 147. to 150. Sc. 1 Vern. 194.

Lord Keeper *North* was of opinion, in the caſe of *Howard* v. *Harris*, that, if there was a covenant in the mortgage-deed for payment of the intereſt, upon which an action of debt would lye, the court would allow, intereſt on intereſt, though no account was taken before a Maſter. In that caſe, a mortgage for 1000*l.* had been made, upon a reverſion, ten years, and in the deed, there were covenants for payment of the principal and

ſixty

ſixty pounds *per annum* intereſt. and 7*l. per annum*, rent, was *only* reſerved; and it was urged, that the mortgagee, againſt whom the bill was exhibited to redeem, ought, in this caſe, to have intereſt upon intereſt, otherwiſe, he would be a great loſer. To which it was anſwered, that the bill had been filed ſix years, and that the mortgagee had, by anſwer, oppoſed the redemption, and therefore, from that time, he had no pretence for an allowance of intereſt for his damages; and that it was never known, in the court, that intereſt upon intereſt was, at *any* time, allowed in ſuch caſe.

1 Vent. 364. Supra. 18. 98, 99.

But, the Lord Keeper was clearly of opinion, that, as to ſo much intereſt as was reſerved in the body of the deed, that ſhould be reckoned principal; for, it being aſcertained by the deed, an action of debt would lye for it, and, therefore, it was reaſonable that there ſhould be damages given for the non-payment of that money. As to what had been urged, that this had never been practiſed, and that there was not any ſuch precedent in the court, and that, if this were to be eſtabliſhed for a rule, every ſcrivener would reſerve all his intereſt half yearly, from time to time, as long as the money ſhould be continued out upon the ſecurity, which would be to change the law, and practice of the court, and make all

mortgagees,

mortgagees pay intereſt upon intereſt; the Lord Keeper ſaid, that he was clear in the diſtinction between debt, and damages, and he ſaw no inconvenience that could enſue; it would ſerve only to quicken men to pay their juſt debts. And it was decreed, accordingly, that, after a deduction of the yearly rents of the mortgaged premiſes out of the 60 *l.* a-year, payable for the intereſt, the defendant ſhould be allowed intereſt, for the reſidue of the ſaid 60 *l.* a-year, *for which* the mortgagee might have *ſued at law*, and *recovered damages*.

But, here, we muſt attend to the diſtinction between the laſt caſe, where the ſecurity for the intereſt reſted *in covenant only*, and the ordinary caſes, where, the rents, of the mortgaged premiſes, are ſufficient to pay the intereſt: as, if this determination be according to law, it appears to me, it muſt have turned upon that point; for, it is certain, that, in general, an agreement, made at the time of the mortgage, (and a covenant, in truth, is no more than an agreement,) will not be ſufficient to make future intereſt principal; ſuch terms being conſidered, as bearing hard upon the mortgagor, and as oppreſſive.

Ld. Oſſulton *v.* Ld. Yarmouth. Salk. 449.

Thus, where *Y.* made a mortgage to *O.* with a proviſo, that, if the intereſt was ſix months in arrear, then, it ſhould be account-

ed

ed principal, and carry intereſt; Lord Chancellor *Cowper* decreed, the clauſe to be vain, and of no uſe; for, that an agreement, *made at the time of the mortgage*, would not be ſufficient to make future intereſt principal; but it was requiſite, that intereſt ſhould be firſt grown due, when, an agreement concerning it, might then make it principal.

And ſo was it likewiſe held in the caſe of *Thornhill* v. *Evans*; but, then, it muſt be upon a *fair agreement*, and is ſaid to have been generally done, on the advance of freſh money. Thornhill *v.* Evans. 2 Atk. 331.

Intereſt upon intereſt will never be allowed, becauſe intereſt is in arrear, *when* the mortgage is paid off. Ibid.

A mortgagee, in poſſeſſion, is not obliged to lay out money, *any further*, than to keep the eſtate in neceſſary repair; but, if a mortgagee hath expended any ſum of money, in ſupporting the right of the mortgagor to the eſtate, where his title hath been impeached, the mortgagee may, certainly, add this to the principal of his debt, and it will carry intereſt. 3 Atk. 518.

A remainder-man can force the tenant for life, to keep the intereſt down, if the land be charged; but, cannot compel him to Hungerford *v.* Hungerford. Gilb. Rep. Eq. 69.

redeem directly, though indirectly, he may, by purchaſing in the mortgage; then, the tenant for life, muſt pay one third, or part with the poſſeſſion.

Cited in Hayes *v.* Hayes. 1 Ch. Ca. 223.

So, where *A.* granted a charge of 100 *l. per annum* in fee, and deviſed eſtates, to *B.* for life, remainder to *C.* in fee, and then died. *C.* exhibited his bill, to compel the tenant for life, to pay the arrears, as, otherwiſe, all would fall on the reverſioner; and it was ſo decreed.

Ameſbury *v.* Brown. 1 Vez. 477.

If there be tenant in tail, remainder over, ſubject to a preceding mortgage or incumbrance, and tenant in tail be in poſſeſſion, and receipt, of the rents and profits, and lets the intereſt run in arrear, without applying them to keep it down; neither the iſſue in tail, or the remainder-man, can come, againſt the tenant in tail, to compel the keeping down the intereſt, or againſt his repreſentatives, after his death, to compel the

1 Vez. 480.

indemnifying, and diſcharging the remainder, from the arrears of intereſt, incurred during his poſſeſſion, and receipt of the profits; for, in this caſe, courts of law, as well as of equity, conſider the reverſioner or remainder-man, as, in the power of the tenant in tail.

Chaplin *v.* Chaplin. 3 Will. 235.

So, where *P C.* made a mortgage for years, and then entailed the eſtate mortgaged

ed on himſelf and the heirs male of his body, remainder to his brother *I C.* in tail male, and afterwards died, leaving iſſue one infant ſon; the latter ſuffered the intereſt to run in arrear for near twenty years, and died juſt before he came of age, leaving a perſonal eſtate. Upon a bill, filed againſt his repreſentatives, it was inſiſted, that his executors, ſeeing their teſtator took the rents and profits of the eſtate, ought to keep down the intereſt, and the rather, he having never had it in his power to bar the eſtate, by a recovery; *ſed per curia*, there was no precedent of a tenant in tail being obliged to keep down the intereſt upon a mortgage; for, he had an eſtate which might laſt for ever, and the remainder over was not aſſets, or regarded in law; and, as he had a power over the eſtate, to commit any waſte, or ſpoil, thereon; a court of equity had never injoined him to keep down the intereſt: and the court refuſed to make any order upon the executors, to pay the arrears. Hilary 1733.

But, by a later deciſion, it ſeems, now, to be ſettled, that, if tenant in tail be an infant, *not otherwiſe*, and his guardians, or truſtees, be in poſſeſſion of the profits of the eſtate, he ſhall be liable to pay the intereſt: becauſe, what *ought* to be done, by the guardian, ſhould be conſidered, *as* done; and it is a rule, that the act of a guardian, or truſtee,

of an infant, ſhall not alter his property, or *that* of thoſe *coming after him*; and the reaſon why tenant in tail is not liable to pay the intereſt, which is, becauſe he can bar the whole eſtate, does not operate in this caſe: for, an infant cannot bar the remainders, unleſs under the king's privy ſeal, which is never granted voluntarily, to change the rights of the parties, but, only, in caſe of family ſettlements.

Sir John St. Alban's caſe. Salk. 567.

Thus, where *P.* was tenant for life of an eſtate, with power to charge any ſum, not exceeding 4000 *l*, thereon, remainder to *W*, her ſon, in tail, remainder to the right heirs of her father; *ſhe* charged the eſtate accordingly, and then died. *W.* died, without heirs and under age, leaving the intereſt in arrear. The plaintiff claimed the remainder as right heir of the father, inſiſting, that as he was under no neceſſity of claiming as heir at law of *W*, the remainder in fee not having veſted in poſſeſſion in *his* life, the perſonal eſtate of *W*, muſt be applied to pay the intereſt of the 4000 *l*, during his life: but Lord *Hardwicke* was againſt the plaintiff on this ground, and decreed for him, only, on the rule above mentioned.

Sarjeſon *v.* Cruiſe. Oct. 26. 1742. Cited 1 Vez. 477. 480. and confirmed.

But, if tenant in tail diſcharge the intereſt of incumbrances, neither he, nor any in his place, will be permitted to ſet up *that*, as a fact undone, but, the remainder-man ſhall

Ameſbury *v.* Brown. 1 Vez. 477. Supra. 400.

have the benefit of it; and none, in the place of tenant in tail, can inſiſt on being a creditor upon that eſtate.

If there be baron and feme, and the huſband take in a mortgage of an eſtate, of which his wife is tenant in tail, and is in receipt of the rents; the huſband will not be allowed intereſt, on the mortgage, during the life of his wife, on a bill exhibited by them in reverſion after her death.

Thus, where *A*, ſeiſed in tail of the equity of redemption of an eſtate, reverſion in fee to the right heirs of her brother, (which heirs were four ſiſters, *A.* being one,) levied a fine, and made a conveyance thereof to *B*, by leaſe and releaſe, in conſideration of money paid, and of paying 600 *l.* due on the mortgage, and ſeveral legacies charged on the eſtate by the teſtator's will, under which ſhe claimed. Afterwards, *ſhe* inter-married with *B*; and, previous to the marriage, a ſettlement was made of this eſtate (which was the huſband's, under the prior purchaſe,) to the huſband for life, remainder to the wife for ninety-nine years, if ſhe ſo long lived, remainder to the iſſue of the marriage, remainder over. After the marriage, the huſband took an aſſignment of the mortgage, reciting, that the premiſes had been deviſed to his wife, and alſo took a conveyance, of the legal

Ameſbury *v.* Brown. 1 Vez. 477. Supra. 400. 402.

eſtate, in fee, to his own uſe. The wife died without iſſue, the huſband continued in poſſeſſion. Then the three co-heirs of the firſt teſtator, being intitled to the reverſion in fee, brought a bill, againſt *B*, to redeem this eſtate, on payment of ſuch part of the incumbrances thereon, as they were bound, by law, to diſcharge; inſiſting, that they were not obliged to pay intereſt, on the principal ſum of theſe incumbrances, further back, than *from the death of the wife*; for, *B.* having taken in the mortgage, and received the profits, the intereſt, during *her* life, would be, ſuppoſed to be paid: and ſo it was held, by Lord *Hardwicke*, who ſaid, that there was no determination *directly* on the point, therefore he muſt decide, on general principles.

The wife was intitled, herſelf, to the reverſion in fee of one fourth part, the other three-fourths thereof, belonging to the plaintiffs, the three co-heirs. She might, by recovery, have barred the reverſion in fee in the *whole*; by fine, ſhe could barr it in *her own* fourth part. The taking the aſſignment of the mortgage, by the huſband, appeared, from the recital, to have been after the marriage, when the huſband, if the ſettlement had been good, was ſeiſed, in his *own* right, for life; if not good, and the eſtate in tail continued, he was ſeiſed in right of *his wife*.

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The queſtion was, from what time intereſt was to be computed? He was of opinion, that the huſband was not intitled to have any allowance of three fourth parts of the intereſt, during the time he was in poſſeſſion, conſidering him in any light.

Firſt, as a purchaſor of this eſtate, by the aſſignment, and conveyances, made by the wife when a feme ſole, which was the true way; but, if that was out of the caſe, conſidering him, as huſband of tenant in tail in poſſeſſion of the eſtate, having taken in a mortgage thereof; the rule of equity would be, that his purchaſe would be defeated, but he would have the benefit of the mortgage, ſo taken in, for ſatisfaction of his principal and intereſt, ſo far, as they were not ſatisfied by the rents and profits of the eſtate; for, in that caſe, he muſt be conſidered as a mortgagee: if, as a mortgagee in poſſeſſion, he muſt account for the rents and profits of the eſtate, and, out of them, the intereſt of the mortgage muſt be kept down: if he had purchaſed the reverſion only, and taken an aſſignment of the mortgage, and never come into poſſeſſion, and his purchaſe had been *then* defeated, and he evicted, he would have been intitled to have had his whole principal and intereſt; becauſe, he would have received nothing, out of the eſtate, to keep down the intereſt.

So it would be, on the foot of the purchaſe, taking it in the leaſt favorable light, for the plaintiff: nor, on the foot of the ſettlement, would it mend the caſe; for, as tenant for life under that ſettlement, he would be bound to keep down the intereſt; ſo would the wife have been, if ſhe had ſurvived.

This brought his Lordſhip to the ſecond way of conſidering it; namely, as if the purchaſe, and ſettlement, were out of the caſe, and, looking upon the huſband as having married tenant in tail, of an eſtate, reverſion in fee to ſtrangers as to three fourths, and, being in poſſeſſion, in her right, taking in a preceding mortgage binding that eſtate in tail, and, afterwards, continuing in poſſeſſion and receiving the rents and profits.

The queſtion, *then*, would be; whether ſuch an huſband, after the death of his wife without iſſue, was intitled, notwithſtanding the receipt of the profits, not to be redeemed without payment of the whole intereſt? In general, a court of equity endeavoured to make every part of the ownerſhip of an eſtate, bear part of the incumbrance; as if there were tenant for years, or life, ſubject to a mortgage, he muſt keep down the intereſt during his time. Suppoſe the tenant in tail had not married, but, had taken an aſ-

ſignment

ſignment of the mortgage to herſelf, and died, without barring the remainder in fee; taking the aſſignment to herſelf, ſhe would have been conſidered as owner, and ſeiſed of an eſtate, which might have continued for ever; then, perhaps, the reverſioner would have had ſtronger reaſon to ſay, that the whole eſtate was diſcharged of this mortgage, than, on the other ſide, the repreſentatives of tenant in tail would have to ſay, that they ſhould be re-imburſed the intereſt, incurred due during her life: becauſe, it might be conſidered as waiting upon the inheritance during that time; but, it had not been carried ſo far as that. In the caſe of Mr. *Smith* of *Weale Hall* in *Eſſex*, tenant in tail died, without barring, but, had taken in a mortgage, which was conſidered, for the principal, as an incumbrance on the eſtate, but the queſtion of intereſt did not ariſe there. No caſe had been cited, where, ſuch a tenant in tail, being in poſſeſſion, his perſonal repreſentative had been allowed to burthen the reverſion, in fee, with the intereſt, incurred during his life, where he was owner both of the eſtate in poſſeſſion and the charge; and it would be of very miſchievous conſequence, if it ſhould be taken to be otherwiſe. Suppoſe ſhe, after taking in the mortgage, had married, and then died leaving iſſue in tail; could her perſonal repreſentatives come againſt the iſſue, to burthen the

eſtate with the intereſt of that mortgage? It would be conſidered, as *taken in* for the *benefit* of the iſſue in tail. Caſes of this kind depended on ſuch a variety of circumſtances, that it was impoſſible to draw the line. The tenant in tail was but tenant at will to the mortgagee, who might have brought an ejectment, turned her out of poſſeſſion, and have received the rents and profits; *then* the profits would have been taken from the tenant in tail during her life. Suppoſe tenant in tail had, afterwards, brought a bill to redeem the mortgage, ſhe muſt have redeemed on payment of principal, intereſt, and coſts; ſhould that burden the eſtate of the remainder with all the intereſt, which had been paid out of the rents and profits of that eſtate, in the hands of the mortgagee? None could tell when tenant in tail took the mortgage, or, on what grounds it was done. The reaſon might be, that the mortgagee intended to have brought an ejectment, turned her out of poſſeſſion, and taken the rents and profits to his own uſe: that did not appear, but there might be various reaſons for taking in the mortgage; as, to prevent ſuits by foreclоſure, or ejectment; and it would be making it liable to too great uncertainty, to ſay, that all the minute conſiderations of tenant in tail, taking an aſſignment of a mortgage, ſhould be conſidered, by the court, upon a queſtion between

between the perſonal repreſentative of tenant in tail, and the reverſioner, after it came into poſſeſſion. His Lordſhip did not ſee how this differed, from the caſe of intereſt paid by tenant in tail.

He was unwilling to make a precedent of the repreſentatives of tenant in tail, calling back the intereſt, of an incumbrance, paid. It was right to let things ſtand as the courts found them, at the death of the tenant in tail. And, though, that was not ſtrictly this caſe, this being a caſe of a mortgage taken in by huſband of tenant in tail, ſeiſed in right of his wife; yet, that would not make any difference; for, the huſband of tenant in tail, ſo ſeiſed, ought to be conſidered *exactly* in the ſame ſtate, as tenant in tail would be, and, in no better; namely, taking the eſtate ſubject to all the incumbrances, actions, and remedies, the mortgagee had therein, and to the right and eſtate of the reverſioner, or remainder-man; conſequently, as not having a right, after having received the profits of the eſtate, during the life of the wife, to come againſt the remainder-man for ſatisfaction of the intereſt, which, naturally, the rents and profits were to anſwer.

This was not ſetting up a right to call upon the perſonal eſtate of tenant in tail, to ſatisfy arrears of intereſt, but, ſetting up a right,

right, in the repreſentatives of tenant in tail, to bring a burden on the reverſion in fee, which had been diſcharged by tenant in tail himſelf: and, as there was no precedent, he would not make one.

Bentham *v.* Haincourt. Pre. Ch. 30.

If a firſt mortgagee *enter*, and, afterwards, ſuffer the mortgagor to take the profits, without requiring intereſt, the lands, in the hands of a ſecond mortgagee, ſhall not be charged with any intereſt for that time: that is, the intereſt of the firſt mortgagee ſhall not affect the lands, ſo as to keep out the ſecond mortgagee, longer, than he would have been kept out, if the intereſt had been duly paid.

Whitlock *v.* Waltham. Salk. 158. S. C. Eq. Ca. Abr. 145. Sc. 1 Vern. 150.

If a ſcrivener is intruſted with the cuſtody of a mortgage bond, he may receive the intereſt; and, though he fail, yet, the mortgagee ſhall bear the loſs: and ſo it will alſo be, in ſuch caſe, if he receive the principal, and deliver up the bond; for, being intruſted with the ſecurity itſelf, it ſhall be preſumed, that he was intruſted with a power over it, and with a power to receive the principal and intereſt; the rather, becauſe the giving up of the bond, upon the payment of the money, is a diſcharge thereof: otherwiſe it is, if the obligee take away the bond, for, in that caſe he hath no authority to receive the money.

If

If a ſcrivener is intruſted with the mortgage deed, not the bond, he hath only an authority to receive the intereſt, but, not the principal; becauſe, the giving up the deed is not ſufficient to reſtore the eſtate, but there muſt be a re-conveyance; whereas, the giving up a bond, is, in law, an extinguiſhment of the debt. Ibid.

Although a ſcrivener hath neither the cuſtody of the mortgage, or the bond, yet, if the mortgagee agree, that the mortgagor ſhall pay the intereſt to the ſcrivener, the intereſt may be well paid to him, as long as the mortgagee lives. Ibid.

If a mortgagee in ſuch caſe, die, and his executor come to the ſcrivener, and receive intereſt of him, and at his hands, that becomes due after the death of the mortgagee, this is a good payment: and if, after ſuch receipt, the ſcrivener break, the mortgagor ſhall not bear the loſs; for, it is the mortgagee that truſts the ſcrivener, and the executor comes into the agreement, and, thereby, renews it, ſuppoſing it was determined, by the death of the mortgagee; but it is rather an agreement, than an authority, and cannot die with the party. Ibid.

A mortgagee, refuſing to receive his money, on tender, after forfeiture, will loſe his intereſt, from the time of the tender. Sir John Auſtin *v.* Exrs. of Sir Will. Dodwell. 1 Eq. Ca. Abr. 318. 9.

But

Hix *v.* Ling. before Lord Hardwicke.

But, then, notice of paying off the mortgage muſt have been given, to the mortgagee, at leaſt *ſix calendar months* before, and the money muſt have been tendered on the day of the determination of that notice; for, where the mortgagor omitted to tender the money on the *very* day, on which the notice expired, and, in conſequence thereof, the mortgagee refuſed the tender, the payment of the intereſt was held, by Lord *Hardwicke*, not to be, *thereby*, ſuſpended: for, that, by the omiſſion of the mortgagor, the mortgagee was become intitled to a further notice of *ſix calendar months*, at the expiration of which, a ſtrict tender muſt be made.

Sir John Auſtin *v.* Exrs. of Sir William Dodwell. Supra, 411.

And ſuch a legal tender as will ſuſpend the intereſt, when made to the mortgagee, will alſo bind his executors, or deviſee.

Sutton *v.* Rodd. 2 Ch. Ca. 206. Gyles *v.* Hall. 2 Will. 378. Infra. 414.

But, in ſuch caſe, it ſeems the plaintiff ought to make oath, that the money was always ready, and no profit was made of it: which may be controverted by the mortgagee, who may prove the contrary; namely, that the mortgagee was not ready to pay it, in which caſe, the intereſt muſt run on.

2 Vez. 372.

And, in general, a ſtrict tender muſt be made, or the court cannot ſtop the intereſt; although

although cases may be, where they would wish to do it: *that* of acting a more generous kind part, if the mortgagee had taken it, is not the rule, that the court is to go by.

And, it was held, where a mortgagor tendered a bank note to the mortgagee, for him to take, thereout, what was *then* due for principal and interest, and the mortgagor offered, if he objected to the legality of the tender, being in a bank bill, to turn it presently into money; that, although this was not, strictly speaking, a legal tender, yet, it being proved that the mortgagor offered to turn it into money, that, made it good. *Sed Quære.* For, as the consequence of a refusal, if the tender be legal, is *penal* to the mortgagee, it should seem, it ought to be *strictly* conformable to law.

Sir John Austin *v.* Exrs. of Dodwell. 1 Eq. Ca. Abr. 318. 9. Hill. 1729. 3 Bacon Abr. 659. Supra. 411 412.

Et vid. Hix *v.* Ling. Supra. 412.

The money being a sum in gross, and collateral to the title of the land, the mortgagor must tender it, to the *person* of the mortgagee, and it is not sufficient for him to tender it, *upon the land.*

Co. Litt. 210. *b.* 2 Eq. Ca. Abr. 603. 34.

But, if a time and place for payment of the money be appointed, in that case, he need not seek for the mortgagee, or be in any other place, but, in that, comprised in the indenture, or *there,* longer than the time specified therein.

Co. Litt. 211. *b.* 212.

And

And ſo it is, although a place be not appointed in the proviſo, if the mortgagor give notice, *where* he will pay it off.

Gyles *v.* Hall. 2 Will. Rep. 378. Supra. 412.

Thus, where the mortgagor gave perſonal notice, in writing, to the defendant, the mortgagee, that he would tender the money and intereſt, between the hours of ten and twelve in the morning, at *Lincoln's Inn hall*, at a day and hour appointed therein, which, accordingly, was done; it was objected, that *Lincoln's Inn hall* was not named, in the proviſo in the mortgage-deed, as the place for payment, and, therefore, that the tender muſt be to the perſon; but, it was held that, the money being lent in town, it would be very hard, after perſonal notice being given for payment thereof, and no objection made by the mortgagee to the place, at the time of notice, to make the mortgagee travel with this ſum of money to *Oxford*, where, the mortgagee lived.

Manning *v.* Burgeſs. 1 Ch. Ca. 29.

In ſome caſes, a tender at the houſe of the mortgagee will be ſufficient. Thus, where there was a mortgage, and the mortgagor, afterwards, meeting the mortgagee, ſaid to him, I have monies now, I will come and redeem the mortgage; to which the mortgagee replied, he would hold the mortgaged premiſes as long as he could, and, then, when he could hold them no longer,

let

let the devil take them if he would: afterwards, the mortgagor went to the mortgagee's houſe with money, more than ſufficient to redeem, and tendered it there, but it did not appear that the mortgagee was within, or, that the tender was made to him; the court decreed a redemption; and that the defendant ſhould have no intereſt from the time of the tender, becauſe of his wilfulneſs.

And a like determination was made, in the caſe of *Peckham* and *Legay*. Ibid.

But, if there be a deed of aſſignment preſented to be executed, at the time when the tender is made, in which there are covenants; the mortgagee is intitled to lay them before his attorney, and ſhall have reaſonable time allowed him ſo to do, before the intereſt ſhall ſtop.

Thus, where a bill was brought, in *May* 1742, to redeem a mortgage, in which, the plaintiff inſiſted upon a redemption, on paying the principal money only; for, that the intereſt ought to determine in *February* 1741, becauſe he had given ſix months notice to pay it off, and, had, on that day, tendered the principal and intereſt, with a deed of aſſignment, but the defendant abſolutely refuſed to take the money: the defendant ſwore, that Wiltſhire *v.* Smith. 3 Atk. 90.

that he offered to take the money, provided he might have time to conſider of it, and to adviſe upon the deed of aſſignment, there being covenants therein on his part, upon which, as he was not of the profeſſion of the law, it was reaſonable he ſhould conſult his attorney, whether they were ſuch, as he might, ſafely, execute. And the Lord Chancellor ſaid, that, the plaintiff, not having ſent a draught of the aſſignment to the defendant any time before the money was tendered, as he ought to have done, was in the wrong; for, where there were covenants on the part of the mortgagee, it was very reaſonable, that he ſhould have ſome time to look them over; the plaintiff's attorney ought to have left the deed for a week with the defendant, that he might have had an opportunity to adviſe upon it, and ſhould have appointed a time to pay the money, after the defendant had had ſufficient time to conſider it. And his Lordſhip decreed the mortgage money with intereſt to be paid within ſix months, or, otherwiſe, the plaintiff's bill to ſtand diſmiſſed.

Sharpnell *v.* Blake. 2 Eq. Ca. 603. 34.

So, if there be a controverſy, to whom the equity of redemption belongs, no aſſignment can be made, until that point is ſettled; therefore, the intereſt of the mortgage will not ceaſe, although the money be tendered to the mortgagee, and he refuſe it.

The

The rate of intereſt, originally reſerved upon a mortgage, may be altered at any time, by a parol agreement, without writing; notwithſtanding the rule, that a parol agreement ought not to be admitted, to contradict the terms of an agreement contained in a deed, or any other agreement in writing: for, ſuch ſubſequent tranſaction will not be conſidered, in law, as a *contradiction*, or *alteration*, of the original agreement, but, as a *new ſubſequent parol* agreement; and nothing is more clear, in law, than, that a written agreement may be waved, in part, or, in the whole, or, be varied in the terms of it, by a ſubſequent parol agreement, made upon a new and good conſideration, if the ſubject matter of the latter agreement doth not require that it ſhould be in writing.

Lord Milton *v.* Moore Edgeworth & Damer Edgeworth Infants. 6 Brown's Ca. Parl. 580.

Thus, where Lord *Milton*, being poſſeſſed, under a conveyance from his father, of divers mortgaged premiſes, and all the ſecurities for the ſame, and intitled to all the money due thereon, filed his bill in the court of exchequer in *Ireland*, in *June* 1764, againſt *Moore Edgeworth* and *Damer Edgeworth*, infants, heirs to the mortgagor; praying the benefit of the proccedings in a former cauſe, and for an account, and that the money which ſhould appear due thereon might be paid the plaintiff by a ſhort day, or, that the defendants might be foreclоſed,

and the mortgaged premiſes ſold, for payment of what ſhould appear due.

The defendants, by their anſwer to this bill, admitted moſt of the matters, therein ſtated; but, inſiſted upon the benefit of an agreement, which they alledged had been made between the plaintiff's father, *John Damer*, and the father of the defendants, for reducing the intereſt of the ſaid mortgages, which, by the deed, was originally at 8 *per cent*, to 6 *per cent*.

Iſſue being joined in the cauſe, ſeveral witneſſes were examined, and the ſame came on to be heard in *November* 1771. when, (upon reading an anſwer put in by the ſaid *John Damer*, in 1758, to a bill, filed againſt him by the defendants father in 1757, whereby the former admitted, that, pending a former ſuit, the ſaid defendant's father had told the ſaid *John Damer*. "That the "debts, affecting the eſtates mortgaged, "were ſo great, that if *John Damer* did "not make an abatement in the intereſt of "the money due to him, he would have little "benefit in caſe he ſucceeded in the ſaid "ſuit," and that *Damer* then ſaid, "that, "if that ſhould be the caſe, he would "leave any reaſonable abatement to his "friend *Ambroſe Harding*." Whereby it appeared, that ſuch converſation had paſſed between

between them; and that the ſaid *Ambroſe Harding* underſtood, that *Damer* had agreed to accept of 6*l. per cent.* intereſt upon the money ſo due to him on the ſaid ſecurities; and alſo upon reading other evidence:) the court made an order, directing an iſſue to be tried at the next aſſizes, "whether there "was any, and what, agreement between "*John Damer* eſq, deceaſed, and *Packinton* "*Edgeworth*, deceaſed, at anv, and, at "what, time, for any, and what, abate-"ment of intereſt, on the principal ſums "due to the ſaid *John Damer*"?

From this order, Lord *Milton* appealed, to the Houſe of Lords, and the principal objection, urged by him againſt directing ſuch iſſue, was, that, conſidering the ſtate of the evidence before the court, it was unjuſt to direct an iſſue; becauſe, the anſwer of Mr. *Damer*, which was read by the defendants at the hearing, denied any agreement, between him and *Packinton Edgeworth*, to reduce the rate of intereſt; and this denial, being ſet in oppoſition to any concluſion drawn from *Harding*'s evidence, took away all ground for the courts interpoſing: whereas, by directing an iſſue, upon the trial of which Mr. *Damer's* anſwer could not be read for the appellant, he would be deprived of that evidence, which the de-

fendants had made evidence, at the hearing of the cauſe.

But, it was adjudged, that the order ſhould be affirmed, with this addition; *viz.* that the plaintiff ſhould be at liberty, at ſuch trial, to read the anſwer of *Damer*.

Edwards *v.* Counteſs of Warwick. 2 Will. 171.

Intereſt, due upon a mortgage of money which is in ſettlement, will not be conſidered as in the nature of rent, and, conſequently, go with the mortgage; but, if the tenant, under the ſettlement, die in the broken part of the quarter or half year, the intereſt will be apportioned; and what is due from the laſt day of payment, to the day of the death of the tenant for life, will be paid to his executor, and the reſidue, to him in remainder.

CAP.

CAP. XIV.

Of the Method of Accounting.

THE land, upon a mortgage, being generally left in the management of the mortgagor, and the conveyance thereof rather looked upon, as a collateral ſecurity for the due payment of the money lent and intereſt, than, as an actual alienation; the mortgagee is conſidered, as having no right to meddle with the rents and profits, until after he hath taken poſſeſſion thereof. There is no inſtance of the mortgagor being obliged, by the court, to account to the mortgagee for the rents and profits, for any of the years back, during which he hath been in poſſeſſion: for, if the intereſt be not paid, the mortgagee ought to take the legal remedy to get the poſſeſſion himſelf.

Mead *v.* Lord Orrery *et al.* 3 Atk. 244. 2 Ibid. 107.

If the mortgagee enters upon, and takes poſſeſſion of, the eſtate, he becomes in the nature of a bailiff to the mortgagor, and will be ſubject to account for the profits.

Gould *v.* Tancred. 2 Atk. 534.

So, if the mortgagee be put into immediate poſſeſſion, and the profits of the eſtate evidently exceed the amount of the intereſt, the mortgagor may exhibit his bill for an account.

Fulthrope *v.* Foſter. 1 Vern. 476.

Thus, where *M*, ſeiſed of an eſtate for life, joined with her ſon, who had the inheritance, in a conveyance, by a deed that was abſolute, of lands of 4 *l. per annum*, and a profit out of ſome coal mines, which, *communibus annis*, were worth nine pounds, to ſecure ninety pounds; and the vendee was immediately put into poſſeſſion, but, on a proviſo, that, if the ſon ſhould pay the money at the end of ten years, the vendor ſhould re-convey to him. On a bill brought to redeem, the only queſtion was, whether the defendant ſhould retain the profits, in lieu of the intereſt, or, ſhould account for what he had received out of the eſtate?

It was inſiſted, for the vendee, that the mother, who had parted with the eſtate for life, had the moſt reaſon to complain, and that ſhe was content the defendant ſhould have the profits, in lieu of the intereſt; that the ſon had a good bargain of it, for he had got to himſelf his mother's eſtate for life; and that it was in the nature of a *Welſh* mortgage, where the mortgagee is put

put into poſſeſſion immediately, under a proviſo, to have a re-conveyance on payment of the principal money, in which caſe, the profits always go againſt the intereſt; that this caſe was ſtronger, by reaſon that, here, the profits, ariſing out of the coal mines, were more uncertain than the profit of lands. But, the Maſter of the Rolls was of opinion, that the profits being 13*l.* *per annum*, it was altogether unjuſt and unreaſonable that the ſame ſhould go in lieu of the intereſt of 90*l*; and that, even in *Welſh* mortgages, if the value was exceſſive, the court would decree an account, notwithſtanding there might be an agreement for retaining the profits againſt the intereſt: and a re-conveyance was decreed, on payment of what ſhould appear due, diſcounting the profits received.

Where mortgagees, or truſtees, manage the eſtate themſelves, there is no allowance to be made them, for their care and pains; but, if they employ a ſkilful bailiff, they will be allowed ſuch ſums, as they have paid him: for, a man is not bound to be his own bailiff.

Bonithon *v.* Hockmore. 1 Vern. 316. 3 Atk. 518.

And, though there be a private agreement, between the mortgagee and the mortgagor, for an allowance for the mortgagee's trouble, in receiving the rents and profits of

French *v.* Baron. 2 Atk. 120.

the eſtate, yet, the court will not carry it into execution; for, equity will not allow him any more than his principal and intereſt.

1 Eq. Ca. Abr. 328. 2. 2 Ca. Ch. 3. 3 Bacon's Abr. 658.

If a mortgagee, in poſſeſſion, aſſign over his mortgage, without aſſent of the mortgagor, to an inſolvent perſon, the mortgagee will be bound to anſwer the profits, both before, and after, the aſſignment, though aſſigned only for his own debt: for, he is under a truſt, to anſwer the profits of the pledge, and it is a breach of truſt, to aſſign ſuch pledge to an inſolvent perſon. But *Quære*, if the mortgagor conceal himſelf, ſo that he cannot be ſerved with a *ſubpœna* to foreclose, whether the mortgagee may not aſſign, and not be anſwerable for the profits, after aſſignment?

Anonymous. 1 Vern. 45. 1 Ch. Ca. 258. Toth. 133. 1 Eq. Ca. Abr. 328. 1 Vern. 476. 3 Bacon's Abr. 657, 8.

A mortgagee will not be obliged to account, according to the value of the lands; *viz.* he will not be bound by any proof that the land was worth ſo much, unleſs it can likewiſe be proved, that he actually made that ſum of it, or, might have done, had he not been guilty of fraud, or wilful default: as, if he turned out a ſufficient tenant, that held it at ſo much rent, or refuſed to accept a ſufficient tenant, that would have given ſo much for it: for, it is the latches of the mortgagor, that he lets the lands lapſe into

the hands of the mortgagee by the non-payment of the money, and, when it doth, he is only a bailiff for what he doth actually receive, but is not bound to the trouble and pains, of making the moſt of what is anothers.

But, if the mortgagee enter upon the eſtate, and, thereby, keep other creditors out, he will be charged with all the profits he hath, or might have, received, after his entry. Thus, where a mortgagee had obtained judgment in ejectment, and entered on the mortgaged premiſes, and, thereby, prevented other creditors, that had ſubſequent ſecurities, from entering, and, yet, permitted the mortgagor to take the profits: on bill, by the other creditors, to redeem him, the court ordered, that the mortgagee ſhould be charged with all the profits he had, or might have, received, after his entry.

Coppring *v.* Cooke &c. 1 Vern. 270. Bentham *v.* Haincourt. Pre. Ch. 30. 3 Bacon's Abr. 658.

But, he will not be obliged to account for profits, which he received, or might have received, previous to the commencement, and notice, of ſuch ſubſequent incumbrances; for, until then, his negligence doth no injury. So, where a mortgage was made of leaſehold premiſes, and the mortgagee, having poſſeſſion by attornment of tenants, had permitted the mortgagor

Maddox *v.* Wren. 2 Rep. Ch. 209.

gagor to receive the rents, and the plaintiff, who was the ſecond mortgagee, was, on his bill, admitted to a redemption, on payment of what ſhould appear due on the firſt mortgage. The queſtion was, whether the mortgagee, having had poſſeſſion, ought not to be charged with the rent, which he might have received, but had neglected? *Et per curia*, he ought to be charged with the rent, by whomſoever it had been received, after the ſecond mortgage made; but, what had been received, before the ſecond mortgage, he ought not to be charged with.

And, if a mortgagee permit the mortgagor, to make uſe of his incumbrance to keep out other creditors, he will be charged with the profits, from the time that they would have had a remedy, had it not been for his interpoſition: for, equity will not ſuffer a man to make uſe of his ſecurities, to protect a debtor from the juſt demands of his creditors. Thus, where one, having made a mortgage of his eſtate, became a bankrupt, and the aſſignees of the ſtatute brought an ejectment for the recovery of the lands comprized in the mortgage. The mortgagee having refuſed to enter, and ſuffered the bankrupt to take the profits, and to fence againſt the aſſignees with the mortgage, it was decreed, that he ſhould be

Chapman *v.* Tanner
1 Vern. 267.
3 Bacon's Abr. 658.

be charged with the profits, from the time of the ejectment delivered.

Nor ſhall a mortgagee, being in combination with the tenant, in poſſeſſion, who refuſes to pay his rent, ſuffer the tenant to make uſe of his mortgage, to cover himſelf from legal proceſs, taken out by the mortgagor, to evict him out of poſſeſſion.

Thus, where *G*, who was a mortgagee under *B*, had brought an ejectment, and recovered judgment againſt an eſtate, of which *H.* was in poſſeſſion, by virtue of a leaſe for three years, but for which *H.* paid no rent, being inſolvent; and *G*, being in combination with *H*, (who was accountable to *B.* for eighteen thouſand pounds,) refuſed to take out execution, and *B.* could not eject *H.* by reaſon of *G*'s judgment; it was moved, that *G.* might be compelled to take out execution, and receive the profits in diſcharge of his debt. But it was objected, on his part, that no order had ever been made to compel a mortgagee to take out execution, whether he would or not: for, it might involve him in a ſuit, and would make him, *nolens volens*, bailiff to the mortgagor; whereas, a mortgagee, who acted diſcreetly, would not enter, before he had foreclоſed the equity of redemption. To which, the counſel, for the mortgagor, replied,

Duke of Buckingham *v.* Sir R. Gayer, 1 Vern. 258.

plied, that they would not compel G. to enter; but, in caſe he did not chuſe to receive the profits, they deſired the rent might be brought into court: which the court held to be reaſonable; and it was ordered, that, unleſs G. took out execution before the end of the term, he ſhould be anſwerable for the profits, as, in caſe of wilful default.

Anne, in the dutchey. 2 Eq. Ca. Abr. 594, 3.

It was held, by the court, to be the daily practice, that, if a mortgagee aſſign over his mortgage; yet, he muſt be made a party in a bill of redemption, that he may account for what profits he hath received, in his time.

Needler v. Deeble. 1 Ch. Ca. 299. 2 Ch. Ca. 32. 3 Bacon's Abr. 659. 3 Rep. Ch. 47, 8.

Where there are ſeveral mortgages, an account ſtated between the firſt mortgagee and the mortgagor will bind the reſt, if there be no fraud, or colluſion. So, where the mortgagee ſued the mortgagor to pay, or be foreclоſed of redemption, an account was directed, and ſettled, before a Maſter; and, then, a ſubſequent mortgagee, whoſe mortgage was made before the former bill was exhibited, ſued the firſt mortgagee and mortgagor, to have a new account, ſuppoſing the former account to be falſe, and made by conſent and fraud, but did not inſiſt on any particulars, as, in ſuch caſe, he ought to have done. The Lord Chancellor declared, that the account ſhould bind the

ſecond

ſecond mortgagee, without further examination, if the fraud, and colluſion, were anſwered: for, the firſt mortgagee did all that he could, and was not bound to ſeek after the ſecond mortgagee; for, then, it would be in the power of the mortgagor, to make the aſſurance uncertain and endleſs to the mortgagee. It ſhould ſuffice to deny the fraud and colluſion.

But, the account, between the mortgagee and aſſignee, will not conclude the mortgagor; but it will be referred to the Maſter to ſee, what was really due, on the making the aſſignment, and what money was *actually* paid thereon. 1 Ch. Ca. 68.

An aſſignee, after ſeveral aſſignments, will not be obliged to account for profits, before his own time. Thus, where on a bill to redeem a mortgage, made in 1632, it was inſiſted, by the defendant, that he came in, as an aſſignee at the third hand, and, therefore, that it would be hard to put him to an account *then*; the Lord Keeper ſaid, that, as there had been no ſtint put to the time, at which a mortgage was to be redeemed, the defendant ſhould account; but, in regard he came in at an old hand, it ſhould not be taken, but ſo far, only, as went in diſcount of his money, *not*, for the ſurpluſage. Pearſon *v.* Pulley. 1 Ch. Ca. 102.

So,

Cloberry *v.* Symonds. 2 Ch. Rep. 392.

So, where lands were extended in 1625, and held in extent, and then a bill was exhibited to redeem, and the lands not being redeemed, that bill diſmiſſed in 1641; afterwards, he who had the extent, by virtue of the diſmiſſion, ſold the premiſes to the defendant, and the plaintiff, having ſince bought the equity of redemption, came to redeem; the court, notwithſtanding the diſmiſſion and length of time, ordered an account, from the purchaſe, not, from any time before, but, till then, the profits to go againſt the intereſt.

Ramſden *v.* Langley. 2 Vern. 536.

Where a mortgagor, having been defeated, after a ſpecial verdict and great agitation at law, in his endeavour to overthrow the mortgage by a ſuppoſed entail, exhibited a bill to redeem. The mortgagee having ſworn, that he paid 120*l.* in defending his mortgage, at law, although he had but 60*l.* coſts allowed him, there; the court determined that he ſhould not be held down to the taxation at law, but ſhould, upon the account, be allowed all that he had laid out or expended; and the mortgagee, fearing his mortgage would have been defeated at law, having got adminiſtration, as principal creditor, in the ſpiritual court, he was allowed the coſts expended *there* alſo.

Badham *v.* Odell.

An account, taken by a Maſter, upon a decree in a bill of revivor, brought by an infant

infant heir, will bind the heir, unleſs he can ſurcharge, or falſify.

4 Brown's Parl. Ca. 447. Supra 392.

Where the yearly rents, and profits, of an eſtate, in mortgage, greatly exceed the intereſt of the money lent, reſts are annually made, on making up the account, and the ſurplus applied, to ſink the principal. But, as this is often attended with great hardſhips to mortgagees, (eſpecially, when the ſum is large, and the mortgagee forced to enter upon the eſtate, and, then, can only ſatisfy his debt by parcels, and is a bailiff to the mortgagor, without ſalary, ſubject to an account,) the Maſter is not obliged, on every ſmall exceſs of intereſt, to apply it to ſink the principal; nor, has the court ever laid it down, as an unvariable rule, that the Maſter muſt, always, in taking ſuch account, make annual reſts.

Gould *v.* Tancred. 2 Atk. 534.

CAP.

CAP. XV.

Of Foreclosure.

THE same *principle of substantial justice*, which induced courts of equity, to interfere on behalf of a mortgagor, who had forfeited his estate, (by not performing the condition annexed to the conveyance thereof,) and to relieve him from the consequences, that, in law, followed such neglect, rendered necessary the establishment of rules, by complying with which, the mortgagee might compel the mortgagor to perform the contract, on his part; namely, the repayment of the money borrowed, with interest. This may be done, either, by procuring a decree for sale of the estate, if reversionary, or, if in possession, by calling upon the mortgagor, in court, to redeem his estate presently, or, in default of so doing, to be for ever foreclosed, that is, barred and utterly excluded his equity of redemption without recall, unless, upon *special* circumstances.

2 Inst. 298.

Courts of equity will never decree a foreclosure, until the period, limited for payment of

Bonham *v.* Newcomb. 2 Vent. 365.

of the money, be paſſed, and the eſtate, in conſequence thereof, forfeited to the mortgagee; for, it cannot ſhorten the time given by expreſs covenant and agreement between the parties, as, that would be to alter the nature of the contract, to the injury of the party affected thereby. 1 Vern. 232. Sc. Supra. 27. 47. 124.

On a bill for foreclosure, the title of the mortgagee cannot be inveſtigated; but, he will be left to purſue legal means to eſtabliſh it.

And, therefore, where a mortgagee ſued to have his money, or, that the defendant ſhould be barred of his equity of redemption; it happened, that, by ſubſequent orders, poſſeſſion was directed to be given to the mortgagee, and contempt proſecuted for not delivering it accordingly; upon which the heir of the mortgagor ſet forth a title in his examination, that the mortgagee would have debated, but he was not admitted; it being inſiſted, that the courſe of the court, upon ſuch a bill, was, and the court could go no further than to take away the equity of redemption and leave the mortgagee to ſuch title as he had, at law, but could not amend it; which the Lord Chancellor agreed to, and diſcharged the contempt. Anonymous 2 Ch. Ca. 244.

A mortgagee may bring an ejectment, at law, at the ſame time that he hath a bill of Booth *v.* Booth. 2 Atk. 344.

foreclosure depending; for, he will not be prevented from pursuing *all* his remedies for the recovery of his debt.

But, special circumstances may arise, which will take the case out of the common rule, and induce the court to grant an injunction, to stay proceedings upon the ejectment.

Ibid. Thus, where a bill was brought by the plaintiff against the defendant, for an account of the rents and profits of an estate, during the time that he was guardian to the plaintiff's brother, and for an injunction to stay proceedings upon an ejectment for the possession thereof, it being mortgaged to him; the court, because he was proceeding to foreclose the equity of redemption, it being entangled with an account of the personal estate, agreed to grant an injunction, provided the plaintiff consented to give security to redeem.

Although a mortgagee be, of right, intitled to a decree for foreclosure, after the estate becomes forfeited, if he act fairly, yet, if there be any injustice in the case, the court may refuse such decree. Thus, where a mortgagee, having notice of a voluntary settlement, procured the trustees of the estate to convey to him to protect his incumbrance;

Saunders *v.* Dehew. 2 Vern. 271. Supra 210.

brance; the court, on a bill filed by him to foreclose the children claiming under the ſettlement, refuſed ſo to do; ſaying, that, if he might be ſuffered to protect himſelf by getting in the legal eſtate, they would not carry it on by a decree, in equity, to foreclose.

A mortgagee of a copyhold eſtate, who is not in poſſeſſion, may exhibit his bill againſt a mortgagor, before admittance, for a decree of foreclosure; and, after he has obtained ſuch a decree, may bring his ejectment for the poſſeſſion of the mortgaged premiſes. Sutton *v.* Stone. 2 Atk. 101.

Where a mortgagee is made party to a bill, praying relief is the ſame thing, as praying to redeem; for redemption is the proper relief, and, if upon a reference to a Maſter to ſee what is due for principal, intereſt, and coſts, the plaintiff does not redeem the mortgagee, the court will, on his application, diſmiſs the bill, as againſt him, which is equivalent to decreeing a foreclosure. Cholmley *v.* Counteſs Dowager of Oxford. 2 Atk. 267.

If the heir of the mortgage exhibit a bill to have the mortgagor pay the money, or, to be decreed to make further aſſurance and be foreclosed of redemption; it is a good cauſe of demurrer, that the executor of the mortgagee, who may have title to the mortgage-money, is no party. Freak *v.* Hearley. 1 Ch. Ca. 51.

Meeker *v.* Tanton. 2 Ch. Ca. 29.

And, ſince it has been determined that, in all mortgages, the money belongs to the executor or adminiſtrator, and not to the heir; if it comes out, upon the hearing, that the executor or adminiſtrator are not parties, the plaintiff in the cauſe cannot be permitted to proceed.

Duncomb *v.* Hanſley. 3 Will. 333 in notes.

The executor of the mortgagor need not be party; for, where, on a bill brought by a mortgagee againſt the mortgagor to foreclоſe, it was objected, that he ought to have been a party, as, it did not appear but that he might have paid the debt; it was held by the Maſter of the Rolls and the regiſter, that there was no neceſſity to make him party; becauſe, the bill being *only* to foreclоſe the equity, the plaintiff need, *only*, make *him* a party, that *had* the equity, *viz.* the heir; and the courſe was ſo; neither was the mortgagee any ways bound to intermeddle with the perſonal eſtate, or, to run into an account thereof; and, if the heir would have the benefit of any payment made by the mortgagor or his executor, he muſt prove it.

Clarkſon *v.* Bowyer *et al.* 2 Vern. 66.

But, a foreclоſure obtained, on a bill exhibited by the heir at law, will be binding, although the executor or adminiſtrator be not a party; for, if the executor or adminiſtrator of the mortgagee, ſhould,

ſhould, afterwards, come againſt the heir of the mortgagee, to have the benefit of the mortgage, the heir, in caſe the land be worth more than the money, may pay him the money, and take the benefit of foreclosure to himſelf.

Yet, where the heir of the mortgagee had foreclosed the mortgagor, the executor of the mortgagee being no party; upon a bill, by the executor, againſt the heir of the mortgagee and againſt the mortgagor, the land was decreed to the executor.

Globe *et ux. v.* Earl of Carliſle, cited in the laſt caſe.

But, it is obſervable, that, in the laſt caſe, the heir made no offer to pay the mortgage-money to the executor, which is the baſis of the reſolution, in the former caſe.

A plea of a decree for foreclosure in the common form, with an averment of non-payment of the money, &c. *but no final order for foreclosure*, on appeal from Lord *King*, was held not to be good; for, although ſuch plea and length of time might be a good defence, yet, as a plea, it could not ſtand, for want of a final order.

Senhouſe *v.* Earl. 2 Vez. 450.

On a decree to foreclose at a period certain, the computation of time muſt be, according to calendar months, and, not according to lunar ones.

Anonymous, Barnard 324. Sc. 2 Eq. Ca. Abr. 605. p. 38.

A decree to foreclose tenant in tail of an equity of redemption, will bind his issue, and also those in remainder, who are no parties to the mortgage; because, the equity of redemption is a right set up, *only*, in a court of equity, and may be there extinguished.

Chaumond Roscarrick *v.* Baston. 1 Ch. Ca. 217.

Thus where, in *May* 1613. *R.* on his marriage with *D.* his wife, settled lands on himself for life, remainder to *D.* for life, remainder to the heirs male of his own body, and then died, having issue *C.* his first, and *H.* his second son. *D.* his widow, married with *G.* and they entered on the lands in question as *D*'s jointure. *C.* the son, in *November* 1638. for 800*l.* conveyed these lands by deed, fine, and recovery to *G.* and his wife, to the use of *D.* for life, remainder to the use of *C.* and his heirs, till he failed to pay several sums, amounting to 800 *l*, at several days, and, after default of payment of any of these sums, to *G.* and his heirs. Afterwards, in 1639. *C*, on his own marriage, settled these lands on himself for life, remainder to *M.* his wife for life, remainder to his first and other sons in tail, *remainder to H. in tail.* In 1650. *G.* with the consent of *C.* assigned his estate, which was for the security of the 800*l.* and was forfeited, to *B.* In 1656. *B.* obtained a decree to foreclose, unless *C.* paid him what was due: *C.* died without issue male; *D.* lived till 1668; then,

then, *H.* exhibited his bill to redeem, alledging, that he, being no party to the decree, and *C.* but tenant for life, it could not bind *him*.

But, the court were of opinion, that *H.* ought not to be admitted to redeem; and Lord Chief Juſtice *Hale* ſaid, he was of opinion, that there was no colour for ſuch a decree; that it had gone far enough, and that he would go no farther than precedents in the matter of equity of redemption, which, had too much favour already; there ſhould be no decree for *H.* in reſpect of the antiquity, for, if he would redeem, he muſt come in time. It was but juſt to foreclose for not coming in time; and a decree to foreclose tenant in tail, ſhould bind his iſſue in an equity of redemption. The eſtate moved from *C.* to *B.* and not from *H.* and *C.* was the viſible poſſeſſor and owner. It was a great ſore that mortgagees were but bailiffs; and the limitation to *H.* was but voluntary, ſo his pretence was not to be ſupported againſt a purchaſor, for, ſo, a mortgagee was; here the purchaſe was made abſolute by the decree, and, if there were divers remainders of the equity, there would be no occaſion to make them *all* parties.

But, although, where there is a clear tenancy in tail, there is no occaſion for the 2 Atk. 101.

remainder-man's being a party to a bill of foreclosure, yet, if there be an express estate for life, the remainder-man ought to be a party.

Draper *et al.* *v.* Jennings *et al.* 2 Vern. 518.

If, there be many incumbrancers, some of whom are not made parties to a bill to foreclose, the plaintiff, in the bill, may, notwithstanding, foreclose such defendants as he has brought before the court.

Sherman *v.* Cox. 3 Rep. Ch. 84.

But, those not parties to the suit, will not be bound by such decree. Thus, where *R.* mortgaged his estate to *S.* for 99 years, to *P.* for 40 years, then to *T.* the plaintiff's husband for 1500*l.* and afterwards to *B*; *B.* bought in the two first mortgages; then the plaintiff, administrator, *durante minore ætate*, exhibited a bill against *R.* and *B.* setting forth a title to discover the defendant's title and redeem; to which the defendant answered, but no further proceedings were had, by the plaintiff. *B.* had notice of the plaintiff's title; then, *B.* notwithstanding, exhibited a bill against *R*, alone, to redeem or be precluded, and obtained a decree; during all this time *R.* was in possession. After preclusion of the defendants to the last bill, *C.* bought *B*'s interest, and then, the plaintiff, the widow of *T.* brought a bill to redeem, to which *C.* pleaded his purchase and the equity of redemption

demption barred. Upon this ſtate of the caſe, the queſtion was, whether *B.* ſhould have made the now plaintiff party to his bill to foreclose, and whether ſhe ought not to be let in to redeem? The Lord Keeper declared, that the caſe was to be judged by comparing them on both ſides, and ſo chuſing the leaſt inconvenient; that, it was extremely miſchievous to the mortgagee, to make all perſons that had intereſt, parties: for, by that, every mortgagee, in caſe of ſeveral mortgages, would be continually a bailiff, and his work never at an end; but that, on the other hand, though all were not parties, yet, thoſe who were omitted, would be helped at laſt, as, they would be intitled to their principal, intereſt and coſts; for, they might come in as to the firſt, ſecond, third, or fourth mortgages; whereas, if the plaintiff ſhould *not* be relieved, it would be irreparable loſs and ruin; and, trouble and pains, being leſs prejudicial than ruin and total loſs, his Lordſhip over-ruled the plea.

If there be tenant for life, reverſion in fee, and he in reverſion mortgages his eſtate, in fee, and the mortgagee deviſe it, the deviſee may bring his bill to foreclose againſt the mortgagor, and need not make the heir of the deviſor a party; becauſe, he hath no intereſt in the land, it being all deviſed away

How *v.* Vigures. 1 Ch. Rep. 33. 1 Eq. Ca. Abr. 318, 5.

away from him; and, therefore, the deviſee need only foreclose the mortgagor.

Sale *v.* Freeland *et al.* 2 Vent. 351.

On application to the court by the mortgagee, an infant will be foreclosed.

Per Lord C. J. Holt. 2 Vern. 342. Booth. *v.* Rich. 1 Vern. 295.

But, the intereſt of infants is ſo far regarded and taken care of, in the Court of Chancery, that no decree to foreclose, can be made againſt them, without giving them a day to ſhew cauſe againſt it, when they come of age.

Bennet *v.* Edwards. 2 Vern. 392. Leving *v.* Lady Caverly Pre. Ch. 229.

Thus, upon a bill brought to oblige an infant to redeem a mortgage; upon the hearing, it was decreed to an account, and the infant to pay what ſhould be reported due, *unleſs cauſe, &c.*

3 Bacon's Abr. 148.

The words of ſuch decree are thus; "And this decree is to be binding to the ſaid *J S*, the infant, unleſs he ſhall, within ſix months after he ſhall attain his age of twenty-one years, (being ſerved with proceſs for that purpoſe,) ſhew unto the court good cauſe to the contrary."

Ibid.

If he ſhew no cauſe, the decree is made abſolute upon him; but, when he comes of age, and ſhews cauſe within the ſix months, he may, upon motion, put in a new anſwer and make a new defence; for, it would be

to

to no purpoſe to give him a day to ſhew cauſe, if the infant, notwithſtanding, was concluded by what his guardian had done, who may have made an improper defence, or may have miſtaken the nature of his caſe.

Fountain v. Caine and Jeffs. 1 Wills. 504. Lady Effingham ex. of Lord Howard v. Sir John Napier. 3 Brown's Parl. Ca. 301.

This proceſs is, by way of *ſubpœna*, to be ſerved on the defendant on his coming of age, and is a judicial writ, and muſt be returned in term time. If the infant ſhews no cauſe, the decree is made abſolute.

But, when he comes of age, he will not be permitted to go into the account, nor will he be ſo much as intitled to redeem the mortgage, by paying what is reported due: but, *will be only intitled to ſhew an error in the decree*, or, *that it was unjuſt*; ſo it was admitted, by the counſel on both ſides, in the caſe of *Lyne* v. *Willis*, 13 of *May* 1730.

Mallack v. Galton. 3 Will. Rep. 352.

And where the mortgage depended upon a diſputable title, *viz.* whether the anceſtor of the infant had executed a power, out of which his right to mortgage aroſe, and, ſo no money could be expected upon aſſignment of it over; the court would not decree the infants to be foreclоſed, until they came of age.

Sale v. Freeland *et al.* 2 Vent. 351. Supra 442.

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Booth *v.* Rich. 1 Vern. 295. Supra 442.

It is ſaid, the proper way, in caſe of an infant, is to apply for a decree, that the lands may be ſold to pay the debts, and that will bind him; for, in that caſe, no forfeiture will incur to him, as the ſurplus will be his, after the debts paid. But, even then, if he be decreed to *join* in the conveyance, he muſt have a day after he comes of age; for, there is no other way, than this, for the infant to ſet forth his title, which he ought to have an opportunity of doing.

Cook *v.* Parſons. 2 Vern. 429. Pre. Ch. 184. 5. Fountain *v.* Caine. 1 Will. 504.

Cooke *v.* Parſons. 2 Vern. 429. Supra.

But, if the mortgagee or his alienee be ſatisfied, and does not require that the infant ſhould be a party to the ſale: in ſuch caſe, the legal title being in the mortgagee, and the infant having a mere equity; the decree for ſale, the infant being no party, may be made without a day to ſhew cauſe, but, then, the caſe will be open to inveſtigation, when the infant attains his age.

Mallack *v.* Galton. 3 Will. Rep. 352. Supra 443.

It is ſaid, that if a woman, before her marriage, or the anceſtors of a woman, mortgage lands, and the equity of redemption thereof veſt in her, being a feme covert; upon a bill brought by a mortgagee to foreclоſe, ſhe is liable, to be abſolutely foreclоſed, though the procedure be during the coverture; *and, it is certain, that ſhe ſhall*

have

have no day given to her, or her heirs, to redeem after the coverture ſhall be determined.

This diſtinction between the caſe of a feme covert and of an infant, as to a day to ſhew cauſe, reſults, I apprehend, from the different cauſes which give riſe to their reſpective diſabilities, and from the duration of thoſe diſabilities. The diſability of infants is the conſequence of a privilege given them, by law, for their protection, founded on the natural inability, which is preſumed to attend perſons of tender years, to act for themſelves, and which determines with their minority. That of femes covert is an abſolute incapacity, ariſing from their having loſt, by coverture, all powers of acting for themſelves; the law conſidering them, as having voluntarily delegated their rights to their huſbands, or rather, that their rights are merged in thoſe of their huſbands. The law, therefore, conſiders an infant, as capable of doing *no binding act* during a certain definite period, *unleſs* it be, evidently, for his own good; but, from a feme covert, the law takes the right of acting reſpecting her civil concerns, and, having inveſted the huſband with the right of acting for her, leaves her liable to the conſequences of his neglect, if there be no fraud. The right, therefore, to ſhew cauſe againſt a decree of foreclоſure, made

made during infancy, after the infant attains his full age, is in equity analogous to the privilege he hath, at common law, on an action brought in relation to his inheritance, the deciſion upon which would be a perpetual bar to him, to pray the parolle to demur; for, as, in ſuch caſe, at law, he was not permitted to go on, but for the tenderneſs of his years, (in reſpect whereof the law inferred want of underſtanding in him,) and, for his benefit, that he might not be prejudiced in his eſtate; the court gave an interlocutory judgment, that the ſuit ſhould remain over, until he attained his full age; ſo, in equity, though in reſpect of the original contract, and the right of the mortgagee to his money, and to enable him to procure it, a decree to foreclose is not ſtayed, yet, the *rights of the parties* remain juſt as they were, until he attains his age; when, if any reaſon exiſted *at the time of foreclosure*, which, if urged to the court, would have been a ground for refuſing it, he may take advantage of that, and have it opened: but, the parolle never demurred on account of coverture, for, there was no *natural incapacity* to act in the wife but a *legal diſability*, ſhe having delegated her power to another by her own act, and, thereby, made herſelf liable to the conſequences thereof; and it would have been repugnant to every principle of equity, that

Co. Litt. 246. *b.*

the

the mortgagor, who lent his money under a ſtipulation to be re-paid at a time certain, for the performance of *which the land was bound*, ſhould, by the *accident* of coverture, have been hung up for an indefinite period of time, to be determined by the death of the huſband; for, this differs from the caſe, where huſband and wife have a right of entry, which, if loſt by the neglect of the huſband, will be renewed in the wife after his death: as, there, the right to the lands *is* in the wife, and comes to her, at a period, when, by her incapacity, ſhe cannot avail herſelf of her right of entry, as the means of recovering her eſtate, and no perſon is injured thereby; but, in the caſe of a mortgage, the right, to the lands, in law, is veſted in the mortgagee, by the contract of the parties, for want of performance of the condition; and the court is only called upon, to inforce the contract, by cloſing the equity of redemption, without which the mortgagee can neither get his money, nor, ſafely, intermeddle with the land.

But, although a feme covert ſhall not have a poſitive day given to her, on which ſhe may ſhew cauſe againſt a decree, as an infant ſhall; yet, I apprehend, if a bill be brought againſt her, and her huſband, during coverture, reſpecting her inheritance, which he claims, *merely*, in her right, and he, afterwards,

Gilb. Forum Romanum 161.
Evans *v.* Logan et vide 2 Will. 450. 3 Will. 238.

wards, dies, the right ſurviving to her; ſhe may draw into queſtion, and examination, the validity of the decree, obtained againſt her during coverture, and avoid and reverſe it, if there be *juſt cauſe* ſo to do.

If there be any unfair conduct in the mortgagee, the court will open the foreclosure.

Soley *v.* Saliſbury, 9 Mod. 153. Sc. 2 Eq. Ca. Abr. 600. p. 25.

Thus, where a mortgagee obtained a decree to foreclose the mortgagor, pending a ſuit by his creditors to have the eſtate ſold for payment of their debts: the court decreed, that the creditors ſhould redeem upon payment of principal, intereſt and coſts to the mortgagee, and referred it to a Maſter to take an account thereof, and directed that the lands ſhould be ſold to pay the creditors.

Greſwold *v.* Marſham, 2 Ch. Ca. 170. Supra 103.

So, if there be a mortgagee, and ſeveral judgment creditors, and the perſons, to whom the judgments are given, give the mortgagee notice thereof and tender him payment; if the mortgagee, afterwards, obtain a decree to foreclose, the court will, upon a bill filed by the judgment creditors, open the foreclosure, and decree them their money.

But

But, if the mortgagee had no actual notice of the judgment, the decree to foreclose would bind the judgment-creditor. *Sed quære*, for, in the principal case, the mortgagee *purchased* the estate, after foreclosure, for a further sum of money; and, in the case of *Godfrey* v. *Chadwell*, it was held, that a second mortgagee might redeem the first, after a decree obtained by him to foreclose, although the first mortgagee had no notice of the second mortgage, before the decree. Ibid. 2 Vern. 601. et vide Morrett v. Westerne. Supra 104.

But, the first mortgagee shall be allowed all his expences out of pocket.

Thus, where *L*, a second mortgagee, came to redeem *H.* who had been at great expences in law suits to foreclose the mortgagor, and, otherwise, in relation to the estate; the court ordered, that, his costs should not be taxed, as in an adverse suit, but, that he should be allowed all his costs and expences, as was done in the case of a solicitor, who laid out and disbursed money for his client; and further, that the profits of the estate in question should be applied, in the first place, to pay, and satisfy, what was due for such costs, charges, and disbursements, before it was applied to sink the principal; for, that it was not reasonable he should wait for it, and be allowed it only on the foot of the account, (as had been Lomax v. Hide. 2 Vern. 185.

uſually done,) whereby he might loſe the intereſt thereof, for ten or more years together.

The time for payment, limited on a decree for foreclosure, may be renewed ſeveral times, upon ſpecial circumſtances.

Anony. Barnard Rep. 221. Sc. 2 Eq. Ca. Abr. 605. 37.

Thus, where a decree for foreclosure was made, and ſix months time given thereby for redeeming, according to the uſual form of thoſe decrees; the ſix months being near expiring, the mortgagor obtained an order, for enlarging the time, for ſix months more. After this, he procured another order for enlarging the time, ſix months further, but, it was made part of that order, that he ſhould ſign the regiſter's book, and, thereby, agree not to aſk for a further enlargement. He ſigned the regiſter's book for that purpoſe, accordingly. Notwithſtanding which, on a further motion, that the time might be enlarged ſix months more, upon this circumſtance; that the eſtate was of greater value than the incumbrance upon it amounted to; the Lord Chancellor was of opinion, that, upon that ground, the motion was reaſonable; but, made it part of his order, that this laſt time ſhould be peremptory.

And,

And, where it appeared, that, notwithſtanding a continued endeavour, on the part of the mortgagor, to ſell the lands mortgaged, and pay what was due, he was prevented by inevitable neceſſity, and no wilful default could be alledged in him, as, where a rebellion was ſubſiſting; the court enlarged the time, as to the performance of ſuch decree, *notwithſtanding it had been ſigned and inrolled.*

1 Ch. Ca. 63, 4. Coker *v.* Beavit 1 Rep. Ch. 253. Ilmoord *v.* Claypool. 1 Ch. Rep. 262.

A decree for foreclоſure will not be opened, in favour of a mere volunteer; for, a mortgagor is a purchaſor, and ſo, hath equal equity with a volunteer, and, an abſolute eſtate, in law, by the foreclоſure.

Roſcarrick *v.* Burton, Supra 438. Sc. 1 Eq. Ca. Abr. 317. 4.

In *Welch* mortgages, where, by ſpecial agreement, profits are to be ſet againſt intereſt, there can be no foreclоſure.

1 Vez. 406. Howel *v.* Price. Supra 143.

A foreclоſure, obtained by a firſt mortgagee againſt a ſecond mortgagee, will be opened, in favour of ſuch ſecond mortgagee, if the land be afterwards deviſed by the *firſt* mortgagee to the *mortgagor*; for, although the ſecond mortgagee, having accepted the lands already mortgaged for his ſecurity, muſt hold them, ſubject to the ſame conditions, to which they are liable in the hands of the mortgagor, (he being able to convey only what he has, which is an eſtate ſubject to foreclоſure, unleſs redeemed either by him, or thoſe claiming under him;)

yet, as between the mortgagor and mortgagee, the debt continuing due, and the charge on the eſtate valid, it is capable of re-attaching upon the lands, if they come again into the hands of the mortgagor, or, thoſe of a ſubſequent claimant under him; and the mortgage-deed may be made uſe of, as a kind of equitable eſtoppel, to any plea the mortgagor may put in, in anſwer to this claim. It in ſome degree reſembles the caſe, where a man makes a leaſe, by indenture, of *D.* in which he has no intereſt, and, then, purchaſes *D.* in fee, and, afterwards, bargains and ſells it to *A.* and his heirs; in which caſe *A.* will be ſubject to the leaſe. So, where a truſt is broken, and, then, ſomething done which is a full bar to the *ceſtui que truſt*, yet, the land coming, afterwards, to the truſtee's hands, he was decreed to convey to the *ceſtui que truſt*.

Salk. 276.

Lord Canmore's caſe cited, 1 Vern. 148.

Thus, where there was a firſt and ſecond mortgage made of the ſame eſtate, the firſt mortgagee brought a bill againſt the ſecond to compel him to redeem or to be foreclоſed, and foreclоſed him accordingly: afterwards, the firſt mortgagee, by his will, deviſed the ſame premiſes to the mortgagor; whereupon, the ſecond mortgagee brought a new bill, to ſet aſide the firſt mortgage, and to be let into a ſatisfaction of his money; to which, the defendant pleaded the former ſuit, and decree of foreclоſure: but, the court

Cook *v.* Sadler, 2 Verm 235.

court ordered the defendant, to anſwer the bill.

And, if the mortgagee, after having obtained a decree to foreclose, take out proceſs upon any counter-ſecurity, with intent to recover his mortgage-money, this amounts to a waiver. As, if a mortgagee, after having got a decree to foreclose which is ſigned and inrolled, bring an action of debt on the bond, given at the ſame time, for payment of the money and performance of the covenants in the mortgage-deed; ſuch action will open the foreclosure, and let in the equity of redemption of the mortgagor. For, though the court will, in its diſcretion, after a reaſonable time, allow the mortgagee to take the benefit of the condition annexed to his eſtate; yet, as this is requiring to have ſtrict law, and, often, attended with actual injuſtice, and the payment of the money is the eſſence of the contract, and effects ſubſtantial right between the parties, the court is willing to ſeize any opportunity, either of an actual, or implied conſent, of the mortgagor, to open the foreclosure, and let in the mortgagor to redeem.

Daſhwood v. Blythway, 1 Eq. Ca. Abr. 317, 3.

But, a bill of revivor, and ſupplemental bill, will be no waiver of a decree to foreclose. Thus, where, in 1717. a bill was brought to

Birch's Caſe, Gilb. Rep. Eq. 186.

to redeem, or be foreclosed; and, likewise, a croſs bill to redeem, on which there was a decree, to be let in, on payment of principal intereſt and coſts, or, elſe, to be foreclosed: the mortgagor died; and the account being taken, the plaintiff, finding the eſtate inſufficient, brought a new bill of revivor, and, partly, a ſupplemental bill, both to review the former decree and proceedings, and, likewiſe, to have an account of the aſſets of the defendant, the mortgagor, and, thereout, to have ſatisfaction for a bond, which was given, as a collateral ſecurity, with the mortgage. The defendant, who was the executor of the mortgagor, pleaded the former decree, in bar; inſiſting, that the plaintiff had elected his ſatisfaction, and had not ſo much as ſuggeſted, that it was deficient; ſo that it did not appear, but that he might receive a double ſatisfaction for his debt; and that it was plain he had not waived the mortgage by his bill of revivor. The plaintiff inſiſted, that it was the practice of the court, that taking out of proceſs, or making uſe of any counter-ſecurity, was, in itſelf, a waiver of the foreclosure; and that a mortgagee had, always, his election to waive, and open the foreclosure, and to have recourſe to his bond and covenant, if he thought proper. But, the court was of opinion, that the plaintiff, by his revivor, had not waived the mortgage, or, ſo much

as

as ſuggeſted a deficiency; and the plea was directed to ſtand for an anſwer, without a liberty to except.

Except in the inſtances already mentioned, I do not find that any rules have been, nor do I apprehend, any can be, laid down, by courts of equity, as to the exerciſe of their juriſdiction in opening foreclоſures, either with reſpect to the time, which ſhall be conſidered as a bar, or, to the particular circumſtances, which will intitle a ſuitor to this interpoſition of the court; for, caſes of this ſort, embrace ſuch a variety of conſiderations, and are, frequently, ſo complicated in their nature, that each depends, in a great degree, upon its own combined circumſtances; and may be rather conſidered, as an inſtance of the fact, that the courts will interfere to open a foreclоſure, than, as a general rule, as to the circumſtances, in which relief will be given.

Thus, a decree of foreclоſure was opened, after ſixteen years, where the bill was againſt a mortgagee, who had obtained his ſecurity, part by original mortgage, and part by aſſignment *procured, under colour of being a friend to the mortgagor*; but, in truth, with a view to get him into his power, that the mortgagee might, upon his own terms,

Burgh v. Langton 15 Vin. Abr. 476, p. 2. Sc. 2 Eq. Ca. Abr. 609. 5. 2 Brown's Ca. Parl. 544.

purchaſe his eſtate, which was worth three times as much, as the money, that had been advanced thereupon.

Lant *v.* Criſpe *et al.* 2 Brown's Parl. Ca. 111. 2 Eq. Ca. Abr. 599. Ca. 21 Vin. vol. 15. p. 467. Ca. 16.

But, where the mortgagee, in 1711, entered into poſſeſſion, upon a foreclоſure made abſolute, by conſent, and, conſidering himſelf as having an abſolute eſtate in the mortgaged premiſes, by virtue of the decree, proceeded to make improvements thereon, by pulling down buildings that were ruinous; the mortgagor, ſix years after, in 1717, moved the court for further time to redeem; and, it was ſo ordered, upon terms. But, this, and ſeveral other orders, grafted thereupon, ſimilar in their nature, were reverſed, upon appeal to the Houſe of Lords, upon the grounds, that it was not conſiſtent with the practice of courts of equity, or, warranted by precedents, to enlarge the time for redemption, after the mortgagor's acquieſcence for ſix years, under a foreclоſure, by his own conſent; eſpecially, after an alteration had been made in the eſtate, either, by pulling down the buildings, enlarging them, or otherwiſe; that the appellant had been two years in poſſeſſion, before he began alterations on the eſtate, when he might look upon it as his own, having ſuch a title as would ſatisfy a purchaſor; and, that the money, reported due to the appellant,

appellant, amounted to as much, as the clear rent, at fifty-eight years purchaſe, excluſive of ſubſequent intereſt and coſts that would incur, if the litigation were ſuffered to proceed.

In the laſt caſe, the mortgagor urged, the appellant's acquieſcing at firſt in the order made, in 1717, in the examining witneſſes, and not oppoſing the ſubſequent orders for enlarging the time, as, amounting, to an admiſſion, that thoſe orders were juſt, and that the eſtate in queſtion was ſtill redeemable.

So, in the caſe of *Wichalſe*, executor of *Wichalſe*, againſt *Short*, neither over-value in the eſtate, or, even a parol agreement to redeem, were held by Lord *Cowper* or Lord *Harcourt*, Chancellors, to be ſufficient reaſons to open a foreclоſure, after twenty years; and their decree was, afterwards, confirmed, on appeal to the Houſe of Lords.

Wichalſe Exr. of Wichalſe *v.* Short. Brown's Ca. Parl. 414. 2 Eq. Ca. Abr. 177. Pl. 1. Vin. vol. 7. p. 298. Ca. 15. vol. 15. p. 478. Ca. 2.

In that caſe, *W*, the plaintiff's late huſband, having mortgaged his eſtate at *L.* to ſeveral perſons, and the mortgagees preſſing for their money, the defendant *S.* was prevailed on to advance 1000*l.* for diſcharging thoſe incumbrances; and, accordingly, the former mortgages were aſſigned

aſſigned to him, by deed, dated the 29th of *September* 1691. He, afterwards, advanced to *W.* a further ſum of 500 *l.* on the 3d of *December* 1692; ſo that the eſtate, then, ſtood mortgaged to him for 500 *l.* and intereſt.

Neither principal, or intereſt, being paid at the time limited by the mortgage, or, for above two years afterwards, *S*, in 1694, exhibited his bill againſt *W.* in order to foreclose; to which bill *W.* put in an anſwer, admitting the 1500 *l.* and intereſt to remain due, and offering to pay the ſame, at ſuch time, as the court ſhould appoint; but deſiring a reaſonable time to ſell his eſtate, for that purpoſe.

On the 10th of *July*, 1695, this cauſe was heard; and a reference was made to a Maſter to compute the ſum due &c. and, on payment thereof by *W.* at or before *Lady-day* then next, he was to have a re-conveyance from the plaintiff; but, in default thereof, to ſtand foreclosed: and it was decreed, by conſent, that, if, in the mean time, *W.* could procure a purchaſor for the eſtate, *S.* ſhould join in a ſale thereof.

The time for payment, appointed by the Maſter, which was the 29th of *Auguſt*, 1696. was afterwards enlarged to the 24th

of

of *July*, 1697, when, the money not being paid, nor any purchaſor of the eſtate procured, the decree of foreclоſure was, on that day, made abſolute, and, it being afterwards duely ſigned and inrolled, *S.* was put into poſſeſſion of the mortgaged eſtate.

The mortgagor lived above eight years afterwards, but never attempted to open the foreclоſure, or to diſturb *S.* in his poſſeſſion; yet he, nevertheleſs, took upon him to deviſe this eſtate to his wife; who, in Hilary Term 1708, about three years after her huſband's death, exhibited her bill in the Court of Chancery againſt *S*, praying, an account of the rents and profits of the premiſes, and to be let into a redemption of the eſtate, upon a ſuggeſtion, that the former decree, and proceedings, had been obtained by colluſion.

To ſo much of this bill, as ſought to lay open the foreclоſure, the defendant pleaded the inrolled decree, and his poſſeſſion under the ſame, in bar; and, by his anſwer, denied any colluſion in obtaining that decree. And, upon arguing this plea, before Lord Chancellor *Cowper*, it was allowed.

But, the plaintiff having replied, and witneſſes being examined, the cauſe was heard

heard before Lord Chancellor *Harcourt*, in *April* 1714; when, his Lordſhip declared, that the defendant had fully proved his plea, and, therefore, diſmiſſed the bill, with coſts: which decree of diſmiſſion was, afterwards, affirmed, on appeal to the Houſe of Lords.

2 Eq. Ca. Abr. 177-1 in note.

It appears, both from the reaſons ſuggeſted, by the parties to the appeal to the Houſe of Lords, and by the report of this caſe, that the plaintiff, in the original ſuit, did not reſt, ſolely, upon the ground of fraud and colluſion, in the original decree for foreclоſure, but alſo relied upon frequent promiſes, made, ſubſequent to the decree, by the mortgagee to the mortgagor, to be accountable for the rents, and to re-convey on the repayment of his money, and likewiſe upon the value of the eſtate, which was conſiderably more, than what was due to the reſpondent. But, Lord *Harcourt*, in giving his opinion, ſaid, that the plaintiff came too late; for, that he knew no inſtance, where a man had been let in to redeem, by a new bill, after a decree of foreclоſure, ſigned and inrolled, upon any parol agreement or declaration, or, *by reaſon of any over-value of the eſtate*; ſuch a practice would be of dangerous conſequence, and ſhake abundance of titles.

But,

But, it is obſervable, on the principal caſe, that the mortgagor *himſelf* had acquieſced, during his life-time, under the decree; and that the plaintiff's claim, was that of a voluntary deviſee of an equity of redemption, which had been duly and regularly foreclоſed, *near* 17 *years before*: for, perhaps, a difference would be made if the application came early, and was from the mortgagor himſelf; eſpecially, if all things were in *ſtatu quo*, and no injury would reſult to the mortgagee from expences, incurred in repairs, improvements, or otherwiſe; as, in ſuch caſe, although the mortgagee hath the legal title, yet, the mortgagor ſeems to have the greater equity. Beſides, as the original intention of the parties was a loan, not a purchaſe, no injuſtice would be done by giving the mortgagor leave to redeem, upon making full ſatisfaction to the mortgagee.

Such a diſtinction ſeems to be warranted, by the obſervation of the court in the caſe of *Roſcarrick* v. *Barton*; in which, redemption was denied to a remainder-man after twenty years; but, the Lord Keeper ſaid, that he made a great difference between parties that came to redeem, *who were no parties to the mortgage*, and thoſe that were.

1 Chan. Ca. 220. Supra. 438. 451.

The mortgagee calling it a debt, in his will, to a collateral purpoſe, only, will not

not alter the nature of the eſtate the mortgagee hath in the premiſes, after a foreclosure made abſolute, and many years poſſeſſion by the mortgagee.

Tooke *v.* Biſhop of Ely *et al.* Brown's Parl. Ca. 119. Viner vol. 15. p. 476. Note to Ca. 1. 2 Eq. Ca. Abr. 608. Ca. 1.

Thus, where *Charles Stuteville*, in 1674, 1675, 1677 and 1678. made ſeveral mortgages of his eſtates, in the county of *S*, to Sir *Francis North* for ſecuring ſeveral ſums of money, amounting in the whole, to 2300 *l*; and, in 1682, Sir *Francis North*, in conſideration of 2386 *l*. 5 *s*, paid to him by Lady *Glenham*, aſſigned over all his ſecurities, upon this eſtate, to her and her truſtees. Lady *Glenham*, having another demand upon *Stuteville* of 800 *l*; ſhe, in Eaſter Term, 1682, exhibited her bill in Chancery, praying, that he might either pay her both thoſe debts, with intereſt and coſts, or be foreclosed of his equity of redemption. The cauſe being heard, in Eaſter Term, 1683, the defendant was decreed to pay both debts, with intereſt and coſts, by a limited time; and, in default thereof, that he ſhould be foreclosed: but, he neglecting ſo to do, the foreclosure was afterwards made abſolute, and the decree inrolled.

In *May*, 1684. Lady *Glenham* aſſigned this decree, and all her intereſt therein, to Mr. Juſtice *Dolben*; who, being kept out of poſſeſſion, did, in 1693, bring ſeveral ejectments,

ments, and thereby recovered part of the premiſes; the reſidue being held by Mrs. *Stuteville*, the mother of *Charles*, as having an eſtate, for life, prior to the mortgages.

Soon afterwards Juſtice *Dolben* died, having made his will, and, thereof, conſtituted Sir *Gilbert Dolben* ſole executor and reſiduary legatee; but, in this will, was the following clauſe: "And, if Mr. *Stuteville*'s "*debt be well paid, as I doubt not but it* "*will*, I order my executor, *Gilbert Dolben*, "to pay the ſum of 4800 *l.* amongſt the "children of my nephew, *John Dolben*." And, upon calculation, this ſum of 4800 *l.* exactly agreed with the money decreed to be paid, with the intereſt thereof, from the time of the decree, to the date of the teſtator's will.

Upon the death of Mrs. *Stuteville*, Sir *Gilbert* brought an ejectment, and recovered the lands held by her, ſo that, he was in poſſeſſion of the whole eſtate.

In *July*, 1694, *Charles Stuteville* exhibited his bill in Chancery againſt *Gilbert Dolben*, praying that he might be at liberty to redeem, on payment of the mortgage-money and intereſt; but, to this bill, the defendant pleaded the former decree of foreclo-ſure, and, inſiſted, that the plaintiff ought not to be let in to a redemption.

On the 10th of *July*, 1695, this cauſe came on to be heard before the Lord Chancellor *Somers*, when, the defendant's plea was allowed; but his Lordſhip recommended an accommodation, and, accordingly, it was ordered, by conſent, that the defendant ſhould be at liberty to redeem, upon payment of principal, intereſt, *and coſts*, to be computed by the Maſter. The defendant, however, not complying with this order, nor being willing to abide by this judgment of the court on the plea, moved for leave to amend his bill; and this, the court thought proper to grant, on condition of his giving his own recognizance not to diſturb *Gilbert Dolben*, or his tenants, or commit waſte; but, if he refuſed to comply with this condition in a month, then his bill was to be diſmiſſed with coſts, without further motion; and *Stuteville* not complying with this order, his bill was diſmiſſed accordingly.

Stuteville, ſtill apprehending he had a right to redeem, by deed, dated the 24th of *May*, 1700, ſettled the premiſes upon truſtees, in truſt to ſell, and pay Sir *Gilbert Dolben* and all his other creditors; and, then, in truſt for himſelf, his heirs, executors, adminiſtrators, and aſſigns. He alſo made his will, and, thereby, deviſed all his eſtate, real and perſonal, and his equity of redemption in the premiſes, unto *Catherine*

Tooke her heirs, executors, adminiſtrators, and aſſigns, and ſoon afterwards died.

In *December* 1702, eighteen years after the decree of foreclosure, Sir *Gilbert Dolben* aſſigned over all his eſtate and intereſt in the premiſes to the biſhop of *Ely*, in conſideration of 8000*l*, who, afterwards, purchaſed of the repreſentatives of Mrs. *Stuteville*, a debt of 5800*l*. due to her for the arrears of her jointure, and, for which, ſhe had obtained a decree, whereby the whole eſtate ſtood charged with the debt.

In *June*, 1703, *Catherine Tooke* exhibited her bill againſt Sir *Gilbert* and the biſhop of *Ely*, praying a redemption of the premiſes, on the foot of Lady *Glenham*'s decree; and that ſhe might have a reconveyance, and an account of the rents and profits. To this bill, Sir *Gilbert* pleaded the decree of foreclosure; the biſhop likewiſe pleaded that decree, and his ſeveral purchaſes from Sir *Gilbert*, and from the repreſentatives of Mrs. *Stuteville*; and upon arguing theſe pleas, before the Lord Keeper *Wright*, on the 21 of *July* 1704, they were allowed.

From this order, the plaintiff appealed; inſiſting, principally, that, by Mr. Juſtice *Dolben*'s will and the ſubſequent proceed-

ings, the foreclosure was opened; and that nothing had been since done, to bar the appellant of her equity of redemption.

On the other side it was contended, that Sir *William Dolben*'s calling it *a debt* in his will, to a collateral purpose only, could not alter the nature of the estate he had in the premises, any more than the calling a leasehold estate, an estate in fee simple, would have converted the leasehold into a freehold; that the bishop of *Ely* was a purchasor of the estate, at a very great price, under a decree which had been signed and inrolled above twenty years, and which had been twice allowed, as a good bar of the redemption: and so it was held by the Lords, and the appeal was dismissed, and the decree and order affirmed.

Jones v. Kenrick. 15 Vin. Abr. 470. Pl. 18—Sc. 3 Brown's Ca. Parl. 315—2. Eq. Ca. Abr. 602. Ca. 31.

Nor will a decree of foreclosure be set aside, after twenty years, for matter of form only; not, even, although the estate become of considerable more value than the money lent thereon: but, a demurrer to such bill will be good.

Kirkham v. Smith. 1 Vez. 261.

If tenant in tail of an estate, subject to a mortgage, suffer a recovery, and sell part thereof, and, afterwards, the mortgagee exhibit a bill for foreclosure or sale; though, in law, he hath a right to have all parts of the

the eſtate liable to his ſatisfaction, yet, the equity is, that the part ſold ſhall not be intermeddled with, unleſs the remainder be not ſufficient for the ſatisfaction of the mortgagee.

On mortgage of a *reverſion*, and decree to redeem; inſtead of the alternative, "or *the mortgagor to be foreclоſed*," the court decreed, that the mortgagee *ſhould ſell to ſatisfy the debt*.

Thus, where *G*, being, in his life, ſeized in fee in a reverſion of lands depending upon the life of *H*, by deed, dated the 25th *November*, 18 *Jac*, mortgaged the lands to *A*. and *K*. and their heirs; afterwards the mortgage became forfeited: then, *K*, by deed, dated 1ſt *March*, 22 *Jac*, releaſed all his right, title, intereſt, claim and demand, in the lands, unto *A*. and his heirs for ever. *A*, by his will, deviſed the ſaid premiſes to *L*. in fee. *L*, being a merchant, and his livelihood conſiſting in the returns of money, and the conſideration in the ſaid deed of mortgage being 340*l*. diſburſed, in 18 *Jac*, upon a dry reverſion, exhibited a bill, to oblige the heirs at law of the mortgagor to repay the money, with damages, or, elſe, to have the lands decreed to him to the end that he might ſell them; and ſo the court decreed.

How *v*. Vigures. 1 Ch. Rep. 33. Supra 441.

It ſeems not to be clearly ſettled, whether, where there is a debt ſecured by mortgage, and alſo a bond debt due from the ſame perſon, and the mortgagee exhibits his bill to redeem or be foreclоſed, the mortgagor may redeem, without diſcharging the bond debt, as well as, that by mortgage; but, I apprehend, this doubt ariſes, from not attending to the diſtinction, between an application from the mortgagor to redeem, and one by the mortgagee to foreclоſe: for, we are to obſerve, that the reaſon, why this rule hath been laid down in courts of equity, on application made by the mortgagor to redeem, is, becauſe he who wiſhes to have equity rendered to him, muſt render it to thoſe againſt whom he applies for it. Thus, if a mortgagor, after having forfeited his eſtate, in law, to the mortgagee, by neglecting to perform the condition to which he hath made it ſubject, applies to equity to enable him to redeem, it is but juſt, that, when equity interferes to take from the mortgagee the eſtate, which by law is become abſolutely veſted in him, care ſhould be taken, that the mortgagee is not prejudiced by its interpoſition; which he would certainly be, if other debts that he hath let the mortgagor contract, perhaps, in ſome degree, under confidence that they would be covered by his former ſecurity, were left undiſcharged. But, there is no pretence for the interpoſi-

tion

tion of this maxim, where a mortgagee comes to foreclose: for, his intention is to shut out the mortgagor from *his* equity, and strictly to inforce *his own* legal title. In such case, therefore, the mortgagee electing for himself, and chusing to have a strict performance of the contract, the only equity, which he is intitled to against the mortgagor, seems to be, to be decreed exactly that, which the law would give him, and, for which he hath stipulated, namely, the *land*, or the *mortgage money*, *only*.

Sharpnell *v.* Blake. 2 Eq. Ca. Abr. 603. 34.

And it seems to have been so determined, in the case of *Sharpnell* v. *Blake*, which, as to the point in question, was thus. *B*, being seized in fee of a copyhold estate held of the manor of ——, upon the 5th of *October*, 1725, made a conditional surrender of it to the plaintiff *S.* to secure 400 *l.* and interest, and, afterwards, borrowed 50 *l.* of *S.* upon bond. Then *B*, by two surrenders, (the first dated 26th *May*, 1773, the other 27th *May*, 1734,) mortgaged his estate to the defendant *T.* for 650 *l.* The 29th of *August*, 1734, *B.* became a bankrupt. Some time in *October* following *S.* delivered ejectments against the tenants to get possession of this estate. Upon 30th *October*, the defendants, *T.* and *H.* as assignees, gave *S*, notice that they would pay him his money, due upon the mortgage, the 11th

November following. Upon the 6th *November*, 1734, *S*, not having attended at the time and place appointed to receive his money filed his bill for a foreclosure. *T.* brought a cross bill to redeem *B*'s mortgage, upon payment of principal and interest: *S*, the defendant in the cross cause, insisted upon being paid the bond debt of 50*l*, as lent upon security of the mortgage: for, that, at the time of lending, it was so agreed; and charged, that *T.*'s mortgages were only colourable and fraudulent, to cover the estate from debts. *T.* was *B.*'s son in law, and had made no proof, in the cause, of the payment of the pretended consideration money for the two mortgages: but, the Lord Chancellor held, that this bond debt could not possibly be tacked to the mortgage.

As his Lordship, in delivering judgment upon this case, observed, that it had been settled, that a mortgagee might insist upon being paid a bond debt *against* the mortgagor; that the case was still stronger *against* a second mortgagee or assignee of a commission of bankruptcy; and, that there must be an enquiry before the Master, or, by directing an issue, whether any money was lent upon these mortgages, in order to determine to whom the equity of redemption belonged, *viz*, whether to the assignees,

Quære et vid. Supra 134. 135.

aſſignees, or to the plaintiff in the croſs cauſe, in his own private right; the deciſion, as to tacking the bond debt, is not reconcilable to the obſervation made by the Chancellor, on any other ground, than that of *B.*'s being plaintiff in the bill to foreclose: that ſeeming to be the only difference, in his Lordſhip's mind, between this caſe, and the caſe cited by him as ſettled; the right between the puiſne mortgagees and the aſſignees remaining undetermined.

This diſtinction, between caſes, where the application to equity is made by the mortgagor, and caſes where it moves from the mortgagee, is analagous to a rule laid down on occaſions not very diſſimilar; namely, where equity is required to carry the debt beyond the penalty of a bond: for, where the plaintiff came to be relieved againſt the penalty of a bond, it was ſo decreed, upon payment of the principal, intereſt and coſts, though they exceeded the penalty; and the decree was affirmed upon an appeal to the Houſe of Lords. So, where lands were extended, on a ſtatute or judgment, at much leſs than the real value, and the conuſor came into equity, to make the conuſee account according to the real value, he could not be relieved, without paying all that was due for principal, intereſt, and coſts, although they exceeded the penalty: but, where the ven-

1 Eq. Ca. Abr. 92. 10. Show P. C. 15.

1 Eq. Ca. Abr. 92,8. 1 Vern. 350.

dor of lands entered into a recognizance of 1000*l.* for quiet enjoyment, which was forfeited; though the loſs, the vendee ſuſtained, was much greater than the penalty, yet, upon application, by him, the court would not go beyond it. And where a truſtee of a recognizance releaſed it, without any conſideration; upon bill by the *ceſtui que truſt* againſt the truſtee, the court decreed him to pay the principal and intereſt, ſo as it exceeded not the penalty. And, even, where a ſettlement, or deviſe, was made of lands for payment of debts, and there was a bond debt, the intereſt of which had over-run the penalty; although, ſuch conveyances for payment of debts are conſtrued favourably, yet, the creditor, on a bill brought by him, was reſtrained within the amount of the penalty. The reaſon why this indulgence is given, on applications by the obligor, and uniformly objected to, on ſuit of the obligee, is, becauſe the obligee has choſen his own ſecurity, and made himſelf judge what recompence he ſhall have, in caſe there be a breach in performance of the agreement; and, therefore, there is no equity to enlarge or better his ſecurity: but, where the obligee is defendant, he is intitled to all that is due, before any equity can ariſe in the obligor. So, in the principal caſe, the mortgagee having contented himſelf with a bond for

Bidlake *v.* Arundel. 1 Rep. Ch. 95.

Ievon *v.* Buſh. 1 Vern. 342.

Anonymous. 1 Salk. 154. 3.

3 Bacon's Abr. 650.

the latter money lent, there is no reaſon to better his ſecurity, by tacking it to the mortgage, and making it a lien on the land, which he might himſelf have done, had he thought proper, either by a new mortgage, or an indorſement upon the old one.

And, I apprehend, the law would be the ſame, although the ſubſequent debt were by judgment, or recognizance: for, ſuch creditor cannot be called a purchaſor, nor does he lend his money upon the immediate view, or contemplation, of the cognizor's real eſtate; and, though the cognizee has, thereby, a lien upon the land, yet, that ariſes from the operation of law, and, not from any ſpecifick agreement between the parties: and, therefore, if the principle before ſtated, viz, that, on a bill to foreclose, the mortgagor may redeem on performing his original contract, viz, by payment of the mortgage money, without having any other terms put upon him, be true, the mortgagee will be left, as to his judgment, to his remedy, at law.

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Creating a mortgagee of a term for years out of her eſtate, the reverſion in her will attract the redemption, 313.

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Exception to the above, 434.

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Decreed

Decreed againſt copyholder before admittance, 435.

If mortgagee, party to a bill, praying relief is the ſame thing as praying to redeem, and ſuch bill diſmiſſed, is equivalent to a decree of foreclosure, *ibid.*

The executor of the mortgagee muſt be party to a bill for foreclosure, as if he be not, it will be a good ground of demurrer, *ibid.*

So if it come out, on the hearing, that the executor of mortgagee is no party, the cauſe cannot proceed, 436.

—— but, mortgagor need not be a party, *ibid.*

Obtained, on a bill exhibited by the heir at law of the mortgagee, will be good, though neither his executor or adminiſtrator be party, 436, 437.

For heir ſhall have the land on paying the money, *ibid.*

Decreed and pleaded in the common form, with an averment of non-payment of the money, &c. but no final order for foreclosure, was held not to be good, 437.

—— at a period certain, the time muſt be computed according to calendar months, *ibid.*

—— againſt tenant in tail of an equity of redemption, will bind his iſſue and thoſe in remainder, 438, 439.

Decreed,

Decreed, againſt tenant for life, the remainderman ought to be a party, 440.

May be decreed (when there are ſeveral incumbrancers, ſome of whom are not made parties) againſt thoſe brought before the court, 440, 441.

But thoſe, not parties to the ſuit, will not be bound, *ibid.*

——— in favour of a deviſee of a mortgage, on a bill exhibited againſt the mortgagor, though the heir of the deviſor no party, 441.

——— againſt an infant.

But he will have a day to ſhew cauſe againſt the decree when he comes of age, 442.

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In what manner the mortgagee is to proceed thereupon, 442, 443.

How far the infant may impeach the decree, *ibid.*

Not decreed againſt an infant, where the mortgage depended upon a diſputable title, 443.

Decreed againſt a feme covert, and ſhe ſhall have no day after the coverture to ſhew cauſe againſt the decree 445.

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Exception in favour of feme covert, in caſe of fraud, 447, 448.

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Exception in favour of feme covert, in caſe of fraud, 447, 448.

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Of the mortgagee, made, while in possession of the mortgaged premises, bound the mortgagor at common law, 7, 8.

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Cannot be foreclosed without day to shew cause, 442, 443, 444.

But a sale may be decreed of the mortgaged lands without making infant party, if the purchasor be satisfied therewith, 444.

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Intereſt.

Above 5 *per cent. per annum* either reſerved or taken, by 12 *Anne, ſt.* 2. *c.* 16. renders all aſſurances, and ſecurities for the loan of money, void, 378.

Allowed, at the rate of 6 *per cent. per annum*, on *Iriſh* or *Weſt-India* ſecurities, 378, 379.

On debts, contracted previous to 12 *Anne*, may be reſerved at the rate allowed at the time of the contract made, 379.

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Allowed, on account before a Maſter, on a mortgage upon all money paid as ſurety, 383.

Allowed on an aſſignment, made with concurrence of the mortgagor, upon all money paid by the aſſignee that was due to the mortgagee, 383, 384, 385.

Exception, if on colourable aſſignment only, 383.

On intereſt allowed, where there were ſeveral creditors, a ſale directed, and one creditor purchaſed by conſent of the reſt, 385.

——— not allowed, merely, becauſe the mortgage is forfeited, 386, 387.

Becomes principal, upon a Maſter's report, computing intereſt, 387.

But the report muſt be confirmed, 387, 388.

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Or if the infant agree to allow intereſt on intereſt, and is benefited thereby, 394, 395.

—— not allowed upon account ſigned by the mortgagor admitting ſo much intereſt due, 396.

——— allowed upon a covenant in a deed mortgaging a bare reverſion for payment of intereſt upon which debt would lye, 396, 397, 398, 399.

— not allowed upon an agreement for it, made at the time of the mortgage, but the agree-

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——— allowed, upon money expended in ſupporting mortgagor's right to the eſtate mortgaged, 399.
Muſt be kept down by tenant for life, and if he omit, tenant for life may compel him, in equity, ſo to do, 399, 400.
Not charged upon a ſecond mortgagee, to keep him out of poſſeſſion, if firſt mortgagee enter, and, afterwards, ſuffer mortgagor to take the profits, 410.
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On mortgage money, which is in ſettlement, in caſe of the death of tenant for life, will be apportioned, 420.

Vide **Tenant for Life, Tenant in Tail, Scrivener, Tender.**

Jointress.

Vide **Baron and Feme—Feme covert.**

Judgment.

Shall be paid in turn with mortgages, and the latter ſhall not be preferred, 167.

Allowed on an aſſignment, made with concurrence of the mortgagor, upon all money paid by the aſſignee that was due to the mortgagee, 383, 384, 385.

Exception, if on colourable aſſignment only, 383.

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Vide **Perſonal Eſtate, Deviſe,** ſpecific.

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Vide **Perſonal Eſtate, Deviſe** ſpecific.

Legal Eſtate.

When it paſſes from joint truſtees.

Vide **Truſtees.**

Limitations, Statute of.

Vide **Mortgage.**

London.

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Cannot injure the eſtate, or commit waſte, 87, 88.
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And

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May

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29 *Car.* 2. *c.* 3. 47—164.

3 & 4 *W.* & *M. c.* 14. 364, 365.

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11 *W.* 3. *c.* 221.
2 & 3 *Anne*, *c.* 4. 259.
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9 *Anne*, *c.* 5. 96.
12 *Anne*, St. *c.* 16. Sec. 1. 378.
7 *Geo.* 2. *c.* 20. 71.
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Tacking.

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Which notice muſt be ſtrictly adhered to, *ibid.*

And ſuch notice as will bind the mortgagee will bind his heirs or deviſee, *ibid.*

Oath muſt be made that the money was always ready, which may be controverted, 412.

Muſt, in general, be ſtrict or the court cannot ſtop intereſt, *ibid.*

In bank notes, held to be good, 413.

Quære if good or not, *ibid.*

Muſt be made to the perſon of mortgagee, *ibid.*

Good on the land, if time and place appointed in the deed, *ibid.*

——— though no place appointed, if mortgagor give notice when he will pay it, 214.

Made at the houſe of the mortgagee, when good, 414.

Will not ſuſpend intereſt, if a deed of aſſignment be tendered, at the ſame time, in which there are covenants from mortgagee, unleſs he has had an opportunity of conſidering them, 415, 416.

——— if there be a controverſy to whom redemption belongs, 416.

Term for years.

Introduced by way of mortgage, 8.

Aſſigned, by way of mortgage, does not make the aſſignee liable to the rent and covenants annexed to the leaſe, unleſs he take poſſeſſion, not, though the aſſignment be of the whole term, 78—87.

But, on poſſeſſion taken, the mortgagee becomes liable to the rent and covenants in the original leaſe, 85.

The reſervation of a day, out of the leaſe, ſaves the mortgagee, 84.

Terms, mortgage.

Vide Baron and Feme, Feme Covert, Mortgage.

Time.

How computed on decree of foreclosure, 438.

Title Deeds.

Need not be produced by a purchaſor if he deny notice, 260, 261, 262, 263.

Or even if he hath notice, if it appear from *poſitive* evidence, that he does not know the effect of the deed, that controlling the preſumed evidence, that every man is cognizant of the operation of a deed in his poſſeſſion, 262, 263.

But the mortgagee, or thoſe claiming to ſee title deeds, may falſify the anſwer of the defendant to ſuch bill for a diſcovery, 262.

Will be ordered to be produced in court, on terms preſcribed by the court, 263, 264.

Vide Tacking, as to ſecurities bought in.

An incumbrancer, who neglects to ſecure the title deeds, will not be aſſiſted in Chancery to take them from a ſubſequent incumbrancer, 174.

Aſſignee of a whole term, on mortgage, not compellable in equity to produce his aſ-

ſignment,

ſignment, to enable mortgagee to ſue him upon the covenants of the original leaſe, 78.

Treſpaſs, *vi et armis.*

Vide **Meſne Profits.**

Truſts.

When affected by parol evidence, notwithſtanding the ſtatute of frauds, 59.

Equity of redemption of a mortgage in fee conſidered as analogous to a pure truſt, as to ſome purpoſes, 288, 289.

Fine levied, by a feme covert, will bind her truſt eſtate, 304.

Vide **Baron** and **Feme.**

Truſtees.

If there be ſeveral joint truſtees, and one or more of them join with the *ceſtui que truſt* in a conveyance of the legal eſtate, the alienee will be in of the legal eſtate in a proportionable rate, 167, 168.

Volunteer.

May redeem, as againſt mortgagor, if he claim under him, 97.

Vide **Foreclosure.**

Voluntary Settlement.

Vide **Settlement.**

Waſte.

Not juſtifiable by mortgagee, before foreclosure, 87, 88.
Will be injoined by Chancery, 88.
By trees cut down, the produce will be applied, firſt, to pay the intereſt, and, then, to diſcharge the principal, *ibid.*
Not reſtrained, if the ſecurity defective, *ibid.*

Will.

Vide **Evidence.**

By mortgagee of lands mortgaged, need not have three witneſſes, 164.

Vide **Perſonal Eſtate.** **Legacy,** ſpecific **Deviſe.**

Witneſs.

If a former mortgagee witneſs a ſubſequent mortgage deed, and, knowing the contents, do not inform the latter mortgagee of his demand, he will loſe his priority thereby, 172, 173, 174, 175.
Quære, whether knowledge of the contents of a deed will not be preſumed in the witneſſes, *ibid.*
Not, if the prior incumbrancer made a witneſs, with a view to deceive him, 175.

An attorney may give evidence, if he pleases, as to the affairs of his client, for to do otherwise is his privilege, not that of his client, 248.

York, Province of.

Vide **Personal Estate.**

MVSEVM BRITAN NICVM

FINIS.